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McKINNEY'S
Consolidated Laws of New York
ANNOTATED

BOOK 33

LIQUOR TAX LAW

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Consolidated Laws of New York Annotated

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THE CONSOLIDATED LAWS OF NEW YORK
ANNOTATED

The books of this edition are arranged and numbered as follows:

1. Report of Consolidators and Treatise on Statutes and Statutory Construction
2. Constitution of New York Annotated, Constitution of the United States, Declaration of Independence and Magna Charta
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4. Banking
5. Benevolent Orders
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THE CONSOLIDATED LAWS OF NEW YORK, ANNOTATED

AS AMENDED TO THE CLOSE OF THE REGULAR SESSION OF THE LEGISLATURE OF 1916

Compiled under the Editorial Supervision of
WILLIAM M. McKINNEY

BOOK 33
Liquor Tax Law

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STATE OF NEW YORK
OFFICE OF THE SECRETARY OF STATE } *ss:*

In pursuance of the authority vested in me, by section 932 of the Code of Civil Procedure, I, Francis M. Hugo, Secretary of State, hereby certify that the copies of the laws contained in this volume are correct transcripts of the text of the original laws, and in accordance with such section are entitled to be read in evidence.

Given under my hand and the seal of office of the Secretary of State, at the Capitol in the City of Albany, this 5th day of July, 1916.

[L. S.] FRANCIS M. HUGO,
Secretary of State.

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The annotations in this book close with the cases reported in the following volumes:

218 New York
172 Appellate Division
95 Miscellaneous
160 New York Supplement

The Supplement will cover decisions from these points.

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CONSOLIDATORS' NOTES ON THE LIQUOR TAX LAW

General Note

The Liquor Tax Law is a consolidation of L. 1896, Ch. 112, with its amendments to and inclusive of the legislation of 1907, two independent statutes on local option, and an independent statute which restricts the traffic in liquors by certain municipal officials.

The chapter as here presented contains a number of changes for the sake of better reading, but no change of meaning.

The report of the Board of Statutory Consolidation is dated June 26, 1907, and the Consolidated Laws were enacted in 1909. The legislation for 1908 was examined by the board and any changes that affected the laws as reported in 1907 were embodied in the laws as reported by the board to the legislature of 1909.

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LIQUOR TAX LAW

LAWS 1909, CHAP. 39

AN ACT in relation to the traffic in liquors and for the taxation and regulation of the same, and to provide for local option, constituting chapter thirty-four of the consolidated laws.

Became a law February 17, 1909, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

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LIQUOR TAX LAW

CHAPTER 34 OF THE CONSOLIDATED LAWS

Article 1. Short title; definitions (§§ 1, 2).
2. Traffic in liquors, taxation and regulation of the same; local option (§§ 3–43).
3. *Laws, grants and charters repealed; saving clause; when to take effect (§§ 60, 61).

ARTICLE 1

Short Title; Definitions

Section 1. Short title.
2. Definitions.

§ 1. **Short title.** This chapter shall be known as the "Liquor Tax Law."

The original Liquor Tax Law was chapter 29 of the "General Laws," being L. 1896, ch. 112.

Constitutional right to prohibit sale of intoxicating liquor: see 15 L. R. A. (N. S.) 908 note.

Power to prohibit or regulate the sale of "soft" drinks: see 34 L. R. A. (N. S.) 890 note. *Constitutional power to prohibit or regulate sale of non-intoxicating alcoholic liquor:* see 26 L. R. A. (N. S.) 872 note. *Regulations affecting privacy or attractiveness of premises where liquor is sold:* see 50 L. R. A. (N. S.) 1156 note. *Statutes prohibiting advertising with respect to intoxicating liquors:* see Ann. Cas. 1916A 905 note.

Effect of partial invalidity of statute relating to intoxicating liquors: see Ann. Cas. 1916D 62 note.

Right of prohibition as limited by the United States Constitution and its amendments: see 15 L. R. A. (N. S.) 923 note. *Effect of removal of constitutional objections to state statute:* see 48 L. R. A. (N. S.) 349 note. *Necessity that state statutes regulating sale of liquors, inoperative because of conflict with federal law, be re-enacted after change in federal law:* see 19 Ann. Cas. 607 note.

Validity and construction of Webb-Kenyon law: see Ann. Cas. 1915D 1171 note.

Federal courts following state decisions as to validity of ordinances respecting traffic in liquors: see 40 L. R. A. (N. S.) 442 note.

State regulation of transportation of intoxicating liquors: see Ann. Cas. 1917A 622 note. *State regulation as affecting interstate or foreign commerce:* see notes as follows: 7 L. R. A. 183, 296; 9 L. R. A. 366, 780; 10 L. R. A. 616; 11 L. R. A. 180; 12 L. R. A. 624; 1 L. R. A. (N. S.) 639; 5 L. R. A. (N. S.) 630; 11 L. R. A. (N. S.) 550; 15 L. R. A. (N. S.) 923; 23 L. R. A. (N. S.) 1020; 29 L. R. A. (N. S.) 745; 36 L. R. A. (N. S.) 443. *State regulation of soliciting orders for intoxicating liquors by nonresident as*

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interference with interstate commerce: see 10 Ann. Cas. 736 note. *Privilege tax imposed for sale of liquor on vessel engaged in interstate traffic:* see 3 Ann. Cas. 263 note. *Constitutionality of statute forbidding carrying of liquors into prohibition district:* see 17 L. R. A. (N. S.) 299 note. *Ignorance of contents of package as defense to carrier in prosecution for transporting intoxicating liquors into prohibition territory:* see 18 L. R. A. (N. S.) 1182 note.

Effect of violation of federal pure food law on status of intoxicating liquors: see 47 L. R. A. (N. S.) 987 note.

General power to regulate traffic in liquors.—"Traffic in liquors has been recognized as a lawful occupation, but because of the many evils attendant thereon it is subject to regulation by the State in the exercise of its police power. There is no vested right to carry on such traffic which is in the nature of property; the State can at any time step in and absolutely prohibit it, no matter how long it has been carried on, nor how great sums may have been invested therein, nor how serious the losses which may result from such prohibition." Matter of Hering, (1909) 133 App. Div. 293, 117 N. Y. S. 747, affirmed (1909) 196 N. Y. 218. "A person may sell liquor only under such conditions as the State may impose upon his occupation." Dornhoefer v. Farley, (1914) 161 App. Div. 600, 146 N. Y. S. 891.

"One engaged in the liquor traffic has no vested rights which cannot be controlled or prohibited by the police powers of the State, for the Legislature can suppress the liquor traffic altogether." Matter of Clement, (Brady Certificate) (1907) 54 Misc. 362, 105 N. Y. S. 1054. "It does not seem to be longer an open question that the enactment of statutes regulating the sale of intoxicating liquors is well within the legitimate powers of legislative action in the exercise of the police power of a state in protecting the welfare of its citizens and the public good. The Liquor Tax Law is, therefore, in its general scope and purpose not repugnant to nor forbidden by the Constitution either of the State or of the United States." Clement v. Two Barrels of Whiskey, etc., (1910) 136 App. Div. 291, 120 N. Y. S. 1044.

"The Legislature may at any time prescribe, for the future, more onerous regulations for the conduct of the liquor traffic, or may inhibit it entirely. The certificate is a temporary license for a limited period and gives no rights in perpetuity. The regulation of the liquor traffic is an exercise of the police power of the State. So long as that power is exercised fairly, reasonably and uniformly, no question can be successfully raised as to its being properly exercised." People v. McKee, (1908) 59 Misc. 369, 112 N. Y. S. 385.

Validity of prohibitory law of 1855.—A prohibitory liquor law passed in 1855 was held to be unconstitutional, because it confiscated liquors which had the status of property and which were in the hands of citizens when the act assumed to take effect. People v. Wynehamer, (1856) 13 N. Y. 378.

Constitutionality of Liquor Tax Law.—The validity of the Liquor Tax Law of 1896 has been sustained, not only by the Court of Appeals of this state; People v. Murray, (1896) 149 N. Y. 367, 44 N. E. 146, 32 L. R. A. 344, affirming 4 App. Div. 185, 38 N. Y. S. 909; but also by the Federal courts. Kresser v. Lyman, (1896) 74 Fed. 765, 1 Liq. Tax Law Rep. 66.

Liquor Tax Law as a consolidation.—The Liquor Tax Law is not a new enactment. It was intended as a coherent compilation or consolidation in the form of a re-enactment of all existing statutes in any way affecting the subject matter of liquor taxes in this state. Matter of Ahlers, (1910) 141 App. Div. 891, 127 N. Y. S. 61, affirmed (1911) 201 N. Y. 592, 95 N. E. 1122.

As a revenue law.—One of the results, if not one of the purposes, of the Liquor Tax Law is to raise a revenue to assist in defraying the expenses of state and local government, and it is to an extent, at least, to be regarded as a revenue law. Therefore, when the Liquor Tax Law of 1896 was originally enacted, the courts refused to grant a preliminary injunction to restrain its operation until its constitutionality could be determined; the rule involved

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in the decision being that the courts will not interfere by injunction to restrain the collection of a tax, unless the case is brought within some acknowledged head of equity jurisprudence. Balogh v. Lyman, (1896) 6 App. Div. 271, 39 N. Y. S. 780.

"It is apparent from the general scope and tenor, and even from the title of the Act, as well as from many of its particular provisions, that it was primarily intended as a statute of revenue and only incidentally for the regulation or restriction of the traffic in intoxicating liquors." People v. Wood, (1900) 2 Liq. Tax Law Rep. 243.

Character of law.— The Liquor Tax Law is not strictly a tax law, as it does not have for its primary purpose the raising of revenue for the support of the government; but it is a law enacted under the police power of the state, exactions of which, although denominated taxes, are imposed for the primary purpose of regulating and controlling the liquor traffic. People v. Murray, (1896) 149 N. Y. 367, 44 N. E. 146, 32 L. R. A. 344, affirming 4 App. Div. 185, 38 N. Y. S. 909, so holding with reference to the Liquor Tax Law of 1896. But see Matter of Hyde, (1897) 1 Liq. Tax Law Rep. 196, holding that the Liquor Tax Law was enacted primarily for the purpose of raising a revenue, and it is the duty of the courts, in giving it effect, to construe it so as to promote this object, consistently with its limitations.

Nature as being special or general.— The Liquor Tax of 1896 was held to be a general state excise law, not a general or special city law within the meaning of Art. II, section 2 of the constitution requiring special city bills to be submitted to the mayors of the cities affected thereby. People v. Murray, (1896) 149 N. Y. 367, 44 N. E. 146, 32 L. R. A. 344, affirming 4 App. Div. 185, 38 N. Y. S. 909.

Object.— The object of the statute is to control the sale of intoxicating liquors in the interest of good order. Matter of Lyman, (1898) 28 App. Div. 127, 50 N. Y. S. 977.

Rule of construction.— "The Liquor Tax Law is to be construed liberally, that it may accomplish the purposes for its enactment." Matter of Finley, (Davidson Certificate) (1908) 58 Misc. 639, 110 N. Y. S. 71.

§ 2. Definitions. *Association.* The term "association," as used in this chapter, includes any combination of two or more persons, not incorporated nor constituting a copartnership.

Liquors. The term "liquors," as used in this chapter, includes and means all distilled or rectified spirits, wine, fermented and malt liquors.

Person. The term "person," as used in this chapter, includes and means any corporation, association, copartnership or one or more individuals.

Subsistence. The term "subsistence," as used in this chapter, includes and means food and lodging.

Convicted and conviction. The term "convicted," and the term "conviction," as used in this chapter, include and mean a finding of guilt, resulting from a plea of guilty, the decision of a court or magistrate, or the verdict of a jury, irrespective of the pronouncing of judgment or the suspension thereof.

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Sale. The term "sale," as used in this section, includes and means all sales made by any person, whether principal, proprietor, agent, servant or employee.

Trafficking in liquors. The term "trafficking in liquors," as used in this chapter, is:

1. A sale of less than five wine gallons of liquor; or

2. A sale of five wine gallons or more of liquor, in which less than five gallons of any one kind and quality is included; or

3. A sale of five wine gallons or more of liquor, any portion of which is intended or permitted to be drunk on the premises where sold; or

4. A sale of five wine gallons or more of liquor, when the liquor so sold is delivered, or agreed to be delivered, in a less quantity than five wine gallons at one time; or

5. The distribution of liquor by, between or on behalf of members of a corporation, association or copartnership, to a member thereof or to others, in quantities less than five wine gallons; or

6. The sale of less than five wine gallons of any preparation, compound or substance consisting in whole or in part of distilled or rectified spirits, wine, fermented or malt liquors, which, under the rulings and decisions of the United States internal revenue department, requires the payment of a retail liquor dealer's or retail malt liquor dealer's special United States internal revenue tax, by any person who has paid such tax for the place of such sale, and for the period in which the same occurs, or by any person whomsoever in a place for which such tax has been paid, and in which a retail liquor dealer's or a retail malt liquor dealer's special United States internal revenue tax stamp in force and effect is maintained or posted.

This section was derived from the Liquor Tax Law of 1896, § 2, as amended by L. 1897, ch. 312, § 1; L. 1903, ch. 486, § 1 and L. 1905, ch. 679, § 1. It was amended by L. 1909, ch. 281, § 1, which struck out "of" and inserted "or" after the word "copartnership" in the definition of "Person." It was also amended to read as above by L. 1910, ch. 485, § 1 which added the paragraph, "Convicted and Conviction," and the paragraph, "Sale."

Definition of "hotel:" see, *infra*, § 30-N.

Term "person" generally: see GENERAL CONSTRUCTION LAW, § 37. *Term "food" defined:* see PUBLIC HEALTH LAW, § 40. *Analysis of spirituous, fermented or malt liquors:* see PUBLIC HEALTH LAW, § 43. *Adulteration of wine, distilled spirits or malt liquor:* see PENAL LAW, § 1748; PUBLIC HEALTH LAW, §§ 41, 46. *Pure wine, half wine and made wine defined:* see PUBLIC HEALTH LAW, §§ 47, 48. *Selling half wine not labeled:* see PENAL LAW, § 437.

Do statutes forbidding the sale of a certain class of liquor include nonintoxicating liquor: see notes, Ann. Cas. 1917 A. 94, 26 L. R. A. (N. S.) 895 note; 20 L. R. A. (N. S.) 645, 1146. *Constitutionality of statute declaring*

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beverage intoxicating irrespective of its actual character: see 8 Ann. Cas. 52 note; 6 L. R. A. (N. S.), 186 note. *Cider as intoxicating liquor:* see Ann. Cas. 1915D 429 note. *Jamaica ginger or the like as intoxicating liquor:* see Ann. Cas. 1916B 370 note. *Medicinal or toilet preparations containing alcohol as within purview of intoxicating liquor statute:* see 13 Ann. Cas. 638 note.

Drinks as "food:" see Ann. Cas 1931E 1293 note.

Loan as sale: see L. R. A. 1915C 648 note. *Obtaining liquor for and delivering it to another with latter's money as a sale:* see 28 L. R. A. (N. S.) 334 note; 24 L. R. A. (N. S.) 268 note. *Procuring liquor for another on physician's prescription for self as an illegal sale:* see 21 L. R. A. (N. S.) 1008 note. *Obtaining liquor upon physician's prescription for another's use as a sale:* see 24 L. R. A. (N. S.) 273 note.

Distinction between wholesale and retail sales of liquors: see 18 Ann. Cas. 187 note. *What amounts to retail sales as distinguished from wholesale:* see L. R. A. 1915C 648 note; 32 L. R. A. (N. S.) 622 note. *Dividing consignment of liquor as sale:* see 11 L. R. A. (N. S.) 872 note; 26 L. R. A. (N. S.) 36 note. *Effect of participating in purchase and division of quantity of liquor to render one guilty of an unlawful sale:* see 22 L. R. A. (N. S.) 560 note. *Applicability of liquor laws to vessels:* see L. R. A. 1915F 1140 note.

Statutes purporting to fix the place of sale: see 44 L. R. A. (N. S.) 437 note. *Place where order is taken as place of sale:* see 44 L. R. A. (N. S.) 439 note. *Place of delivery to carrier as place of sale:* see 44 L. R. A. (N. S.) 450 note.

Application of statute regulating liquor traffic to social club distributing liquor to members: see the following notes: Ann. Cas. 1916D 940; Ann. Cas. 1912A 1088; 10 Ann. Cas. 386; L. R. A. 1915C 876; 38 L. R. A. (N. S.) 101; 23 L. R. A. (N. S.) 192; 20 L. R. A. (N. S.) 1095; 12 L. R. A. (N. S.) 519.

Business of selling liquor as "trade": see Ann. Cas. 1916A 1200 note. *Wine merchant as engaged in "trade":* see Ann. Cas. 1916A 1201 note. *Meaning of term "carrying on business" as used in statute relating to sale of liquor:* see 18 Ann. Cas. 33 note. *Person engaged in liquor traffic as "dealer":* see Ann. Cas. 1917A 955 note. *What is a village within statutes or ordinances in relation to intoxicating liquor:* see L. R. A. 1915C 898 note.

"Convicted."— Prior to the amendment of this section in 1910, it was held that the term "convicted" referred to a judgment based on a verdict of guilty, and if sentence was suspended on such a verdict the offender was not "convicted." Matter of Koehler, (1909) 193 N. Y. 605, 86 N. E. 1125, reversing 125 App. Div. 886, 111 N. Y. S. 151. But see People v. Lyman, (1900) 33 Misc. 243, 68 N. Y. S. 331.

"Trafficking in liquors."—A sale at one time of six gallons of liquor, though of two different kinds, is "trafficking in liquors." Matter of Mitchell, (1897) 1 Liq. Tax Law Rep. 118.

Under the Excise Law of 1892, it was held not to be "trafficking in liquors" and thus not an offense for a bona fide club to distribute liquors to its members without a license. People v. Adelphi Club, (1896) 149 N. Y. 5, 43 N. E. 410, 52 A. S. R. 700, 31 L. R. A. 510. And the same conclusion was reached under the Liquor Tax Law of 1896 as originally enacted. People v. Hamilton, (1896) 17 Misc. 11, 39 N. Y. S. 531. As to distribution of liquor by social clubs to its members; see, infra, section 30-O.

A violation of subdivision G of section 30 in keeping a door open or unlocked, is not "trafficking in liquors" as defined in this section. People v. Chase, (1899) 41 App. Div. 12, 58 N. Y. S. 292.

"Trafficking in liquors" as the expression is used in the Liquor Tax Law, refers only to acts of the certificate holder, not to acts of his bartender. People v. Flynn, (1904) 3 Liq. Tax Law Rep. 429.

Duffy's Malt Whiskey.— In United States v. Morfew, (1905) 136 Fed.

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491, which was a criminal prosecution for engaging in the business of a retail liquor dealer without paying the special tax required by the federal law, it appearing by the evidence that the accused had sold Duffy's Malt Whiskey, the court charged the jury as follows: "The fact that there are labels on the bottles, or that it is called a medicine or medicinal preparation, does not make it so. A great many people regard all whiskies as possessing medicinal virtues, and there are no doubt some diseases which, by a prompt use of whisky — I mean plain whisky — may be, if not cured, at least temporarily relieved; but that fact alone does not authorize dealers, whether druggists or others, to sell them without paying the special tax required by law. A manufacturer of medicinal articles putting up preparations containing supposed curative elements of medicinal substances, supposed or claimed to possess the virtue of curing or relieving disorders of the human body, may use in the preparation thereof such a percent. or quantity of alcohol or distilled spirits as he, in his honest judgment, thinks necessary to extract the virtues of the ingredients used and to hold the same in solution, and the merchant or druggist selling such articles in good faith as a medicinal preparation is not guilty of the offense charged in this indictment. But if, as a matter of fact, such preparation contains a large percentage of alcohol or spirits — as much as 50 per cent., or, as the evidence in this case shows, 88 per cent. of proof spirits — the fact that there are other ingredients in it which possess curative powers does not authorize the sale of such articles without the payment of the special tax. The laws against such sales are not to be evaded by mere names which may be added or used to designate a certain preparation composed in the essential parts of distilled spirits. The law does not tolerate subterfuges, and merely disguising whisky or distilled spirits by aromatic or other drugs, or putting some herbs or roots in them to serve as a substitute for whisky, is not to be tolerated."

Peruna.— Where an apothecary sold "Peruna" as a beverage, it was held that an action might be maintained on his bond irrespective of his intent in making the sale. Clement v. Dwight, (1910) 137 App. Div. 389, 121 N. Y. S. 788. In an action on a bond, based on the illegal sale of "Peruna," where the issue was whether Peruna was a medicine or a liquor within the meaning of this section, it was held that an application by the plaintiff for a commission to examine witnesses in another state as to the ingredients of the liquid, would not be refused on the ground that the formula was a trade secret and the relation of the witnesses to the manufacturer was confidential. Cullinan v. Dwight, (1906) 51 Misc. 221, 100 N. Y. S. 896, order reversed (1906) 113 App. Div. 889 mem. As to the authority of a druggist to sell "Peruna," see infra, § 8.

Dewitt's Stomach Bitters.— In a prosecution for a sale of liquor without a certificate, it was held on an issue of the nature of Dewitt's Stomach Bitters, that evidence might be received of other sales by the defendant and of the effect the liquor had on the purchaser. People v. Seeley, (1905) 105 App. Div. 149, 93 N. Y. S. 982, affirmed (1905) 183 N. Y. 544, 76 N. E. 1102.

Malt Rose.— A liquor named "Malt Rose," which appeared from the evidence to be a beverage made to imitate lager beer, and was bottled in the same way, and found by the jury to contain from .74 to 1.18 per cent of alcohol, of which a portion was put into the beverage as one of the ingredients and the balance resulted from fermentation, was held a "liquor" within the meaning of this section. People v. Cox, (1905) 106 App. Div. 299, 94 N. Y. S. 526, affirming 45 Misc. 311, 92 N. Y. S. 125. In a prosecution for selling Malt Rose without a liquor tax certificate, where the people had shown a chemical analysis of the liquid sold, it was held that the defendant should be allowed to show a chemical analysis of other samples of Malt Rose, as tending to prove the inoffensive nature of the drink and as discrediting the accuracy of the analysis of the drink in question. People v. Kastner, (1905) 101 App. Div. 265, 91 N. Y. S. 1004.

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Beer.— The word "beer" may mean malt or fermented liquor, or it may mean the unfermented and unintoxicating extract of various roots or plants. There is no presumption that the word "beer" means fermented or malt liquors, or that it is intoxicating. Matter of Hunter, (1901) 34 Misc. 389, 69 N. Y. S. 908, affirmed 59 App. Div. 626, 69 N. Y. S. 1137.

As to whether allegation or proof of sale of "beer" sufficient to sustain a conviction under statutes prohibiting sale of vinous, malt, fermented, or intoxicating liquors, see 48 L. R. A. (N. S.) 308, note; 25 L. R. A. (N. S.) 466 note. As to judicial notice that beer is intoxicating, see Ann. Cas. 1914C 847 note. As to meaning of term "near beer": see Ann. Cas. 1913D 124 note.

Lager beer.— Lager beer is a fermented and malt liquor within the term "liquors" as defined in this section; and the courts will take judicial notice that such is its nature. People v. O'Reilly, (1908) 129 App. Div. 522, 114 N. Y. S. 258, affirmed (1909) 194 N. Y. 592, 88 N. E. 1128. See also to the same effect: Matter of Cullinan, (1904) 94 N. Y. S. 525, 3 Liq. Tax Law Rep. 306.

As to whether allegation or proof of the sale of "lager beer" sufficient to sustain a conviction under statutes prohibiting the sale of spirituous, vinous, distilled, malt, fermented or intoxicating liquors, see 48 L. R. A. (N. S.) 308 note. As to proof of sale of "lager beer" sufficient to sustain a conviction for unlawful sale of "intoxicating liquors," in absence of proof that it is intoxicating, see 7 L. R. A. (N. S.) 446 note.

Judicial notice of intoxicating qualities.— "As to such well known beverages as whiskey, brandy, gin, ale, and strong beer, the courts without proof acting upon their own knowledge derived from observation, will take notice that they are intoxicating, and will, therefore, require no proof of the fact. . . . But there are, doubtless, intoxicating beverages which are not so well known and of whose character the courts could not take notice, and more intoxicating beverages may yet be discovered. As to all such, when one is charged with selling them in violation of law, it must be proved before a conviction can be had. Hitherto the courts have not been willing to take notice that lager beer is intoxicating, but have submitted the question, when controverted, to the jury, to be determined by the jury." Rau v. People, (1875) 63 N. Y. 277.

See generally in this connection, the following notes: Ann. Cas. 1914C 874; 19 L. R. A. (N. S.) 848; 20 L. R. A. 648; 2 L. R. A. 408.

Comparison with former laws.— Under excise laws prior to the enactment of chapter 112 of 1896, on the question of a sale without a license, it became a question of fact in each case whether the liquor sold or given away was strong, spirituous or intoxicating; and, unless the liquor was such that its strong, spirituous or intoxicating qualities were well known, it was necessary in each case to show affirmatively that it was strong, spirituous or intoxicating. But in the enactment of the Liquor Tax Law of 1896, it seems to have been the deliberate intention and purpose of the Legislature to omit therefrom the words, "strong," "spirituous" and "intoxicating," and to include within the prohibitive parts thereof the traffic in all alcoholic beverages within the definition of "liquors" as contained in this section, and to relieve the court from determining as a fact whether the liquor sold or given away was intoxicating. People v. Cox, (1905) 106 App. Div. 299, 94 N. Y. S. 526.

Cited.— Dornhoefer v. Farley, (1914) 161 App. Div. 600, 146 N. Y. S. 891; People v. Myers, (1904) 109 App. Div. 143, 95 N. Y. S. 993, affirmed (1906) 185 N. Y. 558 mem.; People v. McDonnell, (1908) 108 N. Y. S. 749.

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ARTICLE 2

Traffic in Liquors, Taxation and Regulation of the Same; Local Option

Section 3. State commissioner of excise; duties; necessary party to certain litigation.
4. Office of state commissioner.
5. Deputy commissioner; second deputy commissioner; secretary; clerks.
6. Special deputy commissioners in certain localities; special agents to act in certain cases.
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14. Local option to determine whether liquors shall be sold under the provisions of this chapter in the several localities herein named.
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Section 22. Certain officials not to be interested in manufacture or sale of liquors.

23. Places in which traffic in liquors shall not be permitted.

24. Surrender and cancellation of liquor tax certificates; payment of rebates; notice to police officials.

25. Changing the place of traffic.

26. Voluntary sale of a liquor tax certificate; changing the place of traffic.

27. Certiorari upon refusal to issue or transfer liquor tax certificates, and of the revocation and cancellation of a liquor tax certificate.

28. Injunction for unlawfully trafficking in liquors or without liquor tax certificate.

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30. Other illegal sales and selling; definitions of "hotel" and "guest"; exceptions; special certificates in cities.

30-a. Sales of liquor to United States cadets at or near West Point.

31. Lists of lodgers to be furnished by hotel, lodging and boarding house keepers.

32. In respect to applications to traffic in liquors as keeper of a hotel.

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34. Sales and pledges; when void.

35. Persons liable for violations of this chapter.

36. Penalties for violations of this chapter.

37. Jurisdiction of courts; reports of courts and court clerks; reports of magistrates.

38. Jurisdiction of courts of special sessions in the city and county of New York.

39. Collection of fines and penalties and forfeitures of bonds; reports of county clerks.

40. Duties of public officers in relation to complaints and prosecutions under this chapter.

41. Penalties for neglect of public officers to perform their duty under this chapter.

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Section 42. Recovery of damages in a civil action.
43. Penalties; actions to recover.

§ 3. State commissioner of excise; duties; necessary party to certain litigation. The governor, by and with the advice and consent of the senate, shall appoint a state commissioner of excise who shall hold his office for the term of five years, and until his successor is appointed and has qualified. A commissioner shall in like manner be appointed upon the expiration of the term. If a vacancy occurs in the office of commissioner it shall be filled in like manner for the residue of the term. The commissioner shall execute and file with the comptroller of the state a bond to the people of the state in the sum of twenty thousand dollars, with sureties to be approved by the comptroller, conditioned for the faithful performance of his duties, and for the due accounting for all moneys received by him as such commissioner. The commissioner shall receive an annual salary of seven thousand dollars and his necessary expenses, which salary shall be payable in equal monthly instalments. The state commissioner shall make an annual report to the legislature on or before the second Monday in each year, which shall contain such statements, facts and explanations as will disclose the actual workings of this chapter in its bearings upon the welfare of the state, including all receipts and revenues collected under the law, and all expenses and disbursements incurred, and also such suggestions as to the general policy of the state and such amendments of this law as the commissioner shall deem appropriate. The state commissioner shall also cause the accounts and vouchers of all excise moneys collected and paid over to the state and to the several localities by each county treasurer and special deputy commissioner in the state, and the records of all transactions by them under this chapter to be carefully examined, and the result of such examination certified to the state comptroller at least once in every year between the first day of October and the first day of May; and, in addition to such annual examination, said commissioner may, whenever in his discretion he shall deem it necessary, examine said accounts, vouchers and records. The state commissioner of excise shall be made a party to all actions and proceedings affecting in any manner the submission of the local option questions provided for in section thirteen of this chapter or the result of any vote thereupon or the

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traffic in liquors under this chapter; to all actions and proceedings relative to the issuance of liquor tax certificates under section eight or the transfer thereof under section twenty-four, twenty-five, or twenty-six, or the surrender thereof for cancellation and rebate under section twenty-four; to all injunction proceedings under section twenty-eight; and to all other civil actions or proceedings, whether brought under the provisions of this chapter or otherwise, which in any manner affect the enjoyment of the privileges or the operation of the restrictions provided for in this chapter. From all other parties to such actions or proceedings, he shall be entitled to due notice of all proceedings therein and shall be duly served with copies of all papers and pleadings therein, where such notice of proceedings is not given to and such service of papers and pleadings is not made upon an attorney appearing therein upon his behalf, pursuant to a designation under section seven of this chapter.

This section was derived from the Liquor Tax Law of 1896, § 6, as amended by L. 1897, ch. 312, § 2; L. 1901, ch. 640, § 1; L. 1907, ch. 345, § 1; and L. 1908, ch. 144, § 1. Laws 1910, ch. 503, § 1, purported to amend this section but, in fact, made no change. In the original bill, as introduced in the legislature, the reference to section 26 was omitted. However, in course of passage, this reference was restored and section 3 was left unamended and appears here in unamended form.

Section 3 of the Liquor Tax Law of 1896, "The abolition of boards of excise and their powers and duties," was not consolidated in the Liquor Tax Law of 1909.

Appointment by governor and senate: see PUBLIC OFFICERS LAW, § 7.

Official undertaking generally: see PUBLIC OFFICERS LAW, § 11.

Creation of vacancies: see PUBLIC OFFICERS LAW, § 30.

To whom commissioner may resign: see PUBLIC OFFICERS LAW, § 31, subd. 2.

Judicial knowledge.— The courts may take judicial knowledge as to who is the commissioner of excise. Matter of Clement, (1909) 132 App. Div. 598, 117 N. Y. S. 30.

Ministerial duties.— "The duties of the State Commissioner of Excise are purely ministerial . . . and he has no authority or jurisdiction to pass upon the equitable or contract rights in reference to a certificate not affecting the legal title." Matter of Green, (1916) 171 App. Div. 583, 157 N. Y. S. 736.

Power to determine whether action on bond shall be brought.— "While the State Commissioner of Excise may determine at a given time whether sufficient grounds exist to warrant prosecuting an action upon the bond, that determination is not absolute, so as to bind either himself or his successor in office not to commence an action upon such a bond in the future. His duty in that respect is something like that of the Attorney-General in passing upon an application to bring an action to oust an alleged intruder from a public office, and it has been held that the determination of the Attorney-General, refusing to bring such an action, is not binding upon his successor in office. . . . The State Commissioner of Excise must necessarily act upon the information which he then has. He may reach the conclusion therefrom that the evidence is insufficient to warrant bringing the action,

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when in fact the law has been violated, and if he afterwards discovers that fact, and is satisfied that such a violation can be established, it then becomes his duty to prosecute the action for a breach of the conditions of the bond, and recover the penalty therefor." Clement v. Reavley, (1908) 126 App. Div. 215, 110 N. Y. S. 418.

Power to release surety on bond.— The Commissioner cannot change the conditions of a bond given in connection with an application for a liquor tax certificate, or release the surety from liability thereon in consideration of his paying other bonds on which he is liable. Clement v. Reavley, (1908) 126 App. Div. 215, 110 N. Y. S. 418.

Subpoena duces tecum for papers in office of commissioner.— In a proceeding for the revocation of a liquor tax certificate, a justice of the Supreme Court under rule 9 of the General Rules of Practice may require the commissioner to produce upon the trial the reports of agents made to him on which the prosecution is based, but the production of complaints by citizens should not be required. Matter of Green, (1915) 92 Misc. 503, 157 N. Y. S. 87.

Appeal by commissioner as stay of proceedings.— The state commissioner of excise is a state officer, and under section 1313 of the Code of Civil Procedure an appeal taken by him stays the execution of the judgment or order appealed from without an undertaking or other security. People v. Judson, (1908) 59 Misc. 538, 112 N. Y. S. 408.

§ 4. Office of state commissioner. The trustees or other officers having, by law, the custody of public buildings at the state capitol, shall assign to the commissioner rooms therein, for conducting the business of his department. The commissioner shall from time to time furnish the necessary furniture, stationery, and other proper conveniences for the transaction of such business, the expenses of which shall be paid by the treasurer on the certificate of the commissioner and the warrant of the comptroller.

This section was derived from the Liquor Tax Law of 1896, § 7.

Section 4 of the Liquor Tax Law of 1896, "The continuance of licenses," was not consolidated in the Liquor Tax Law of 1909.

§ 5. Deputy commissioner; second deputy commissioner; secretary; clerks. The state commissioner of excise shall appoint a deputy commissioner who shall receive an annual salary of five thousand dollars and his necessary expenses, which salary shall be payable in equal monthly instalments. During the absence or inability to act of the state commissioner, the deputy commissioner shall have and exercise all the powers conferred by this chapter upon the state commissioner. The deputy commissioner shall give a bond to the people of the state in the sum of twenty thousand dollars and with such sureties as shall be approved by the commissioner. The commissioner shall appoint a second deputy commissioner, who shall receive an annual salary of three thousand five hundred dollars, payable in equal monthly instalments.

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During the absence or inability to act of the state commissioner and of the deputy state commissioner, the second deputy commissioner shall have and exercise all the powers conferred by this chapter upon the state commissioner. The second deputy commissioner shall give a bond to the people of the state in the sum of twenty thousand dollars, and with such sureties as shall be approved by the commissioner. The commissioner shall appoint a secretary, who shall receive an annual salary of two thousand dollars, payable in equal monthly instalments, and a financial clerk, who shall receive an annual salary of eighteen hundred dollars, payable in equal monthly instalments. Such clerk, under the direction of the commissioner, shall have charge of the disbursement of the moneys appropriated for the expenses of the office, and shall give a bond to the people of the state, in such sum and with such sureties as shall be approved by the commissioner. Each of the officers provided for by this section, shall take and subscribe the constitutional oath of office before entering upon the performance of his duties, and may be removed by the commissioner, who may in like manner appoint his successor. The commissioner may also appoint such clerical force in his office as may be necessary.

This section was derived from the Liquor Tax Law of 1896, § 8, as amended by L. 1897, ch. 312, § 3; L. 1903, ch. 486, § 2, and L. 1907, ch. 345, § 2.

Section 5 of the Liquor Tax Law of 1896, "The duties of existing boards of excise," was not consolidated in the Liquor Tax Law of 1909.

Deputies generally: see PUBLIC OFFICERS LAW, § 9.

Official undertakings generally: see PUBLIC OFFICERS LAW, § 11 et seq.

Official oaths: see PUBLIC OFFICERS LAW, § 10.

§ 6. Special deputy commissioners in certain localities; special agents to act in certain cases. The state commissioner of excise shall appoint special deputy commissioners of excise as follows: one for the boroughs of Manhattan and the Bronx; one for the borough of Brooklyn; one for the borough of Queens; one for the borough of Richmond; one for the county of Westchester; one for the county of Erie; one for the county of Monroe; one for the county of Albany; one for the county of Oneida; one for the county of Onondaga; one for the county of Rensselaer; one for the county of Schenectady; one for the county of Niagara; one for the county of Orange; one for the county of Broome; and one for the county of Nassau. Each of such special deputy

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commissioners and their successors in office shall take and subscribe the constitutional oath of office, and execute and file in the office of the state comptroller a bond to the people of the state in such sum and with such sureties as shall be approved by the state commissioner. They shall perform such duties as may be required by the commissioner, or as may be provided by law. The state commissioner may revoke any special deputy commissioner of excise, and shall in like manner appoint his successor, and may appoint in the offices of each of such deputies and their successors such clerical force as he may deem necessary or as may be provided for by law. The special deputy commissioners shall each receive an annual salary, payable in equal monthly instalments, as follows: For the boroughs of Manhattan and the Bronx, five thousand dollars; for the borough of Brooklyn, three thousand seven hundred and fifty dollars; for the borough of Queens, two thousand five hundred dollars; for the borough of Richmond, two thousand dollars; for the county of Westchester, two thousand five hundred dollars; for the county of Erie, three thousand dollars; for the county of Monroe, two thousand five hundred dollars; for the county of Albany, two thousand dollars; for the county of Oneida, one thousand five hundred dollars; for the county of Onondaga, two thousand dollars; for the county of Rensselaer, one thousand five hundred dollars; for the county of Schenectady, one thousand five hundred dollars; for the county of Niagara, one thousand five hundred dollars; for the county of Orange, two thousand dollars; for the county of Nassau, two thousand dollars; and for the county of Broome, one thousand five hundred dollars. Upon each of such special deputy commissioners, and upon any special agent designated by the state commissioner of excise to perform the duties of a special deputy commissioner or a county treasurer, as is hereinafter provided, are devolved all the powers, duties and obligations in the respective county or borough for which he shall be appointed as are possessed by and vested in county treasurers of other counties of this state under and by virtue of the provisions of this chapter. The salaries and expenses of each of such special deputy commissioners of excise, and such office rent and clerical help, office furniture, fixtures and equipment as are authorized and audited by the state commissioner of excise and for which appropriations are made, shall be paid as follows: one-half

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thereof by the treasurer of the state of New York, upon the warrant of the comptroller; and one-half thereof by the treasurer of the county or the fiscal officer of the city in which such borough is included, upon the certificate of the state commissioner of excise. In case the office of any special deputy commissioner of excise or county treasurer shall become vacant, or if any special deputy commissioner or county treasurer shall become incapacitated or unable to perform his duties under this chapter, or shall neglect or refuse to perform any duty devolving on him thereunder, the state commissioner shall designate a special agent to act in the place and stead of such special deputy commissioner or county treasurer during such vacancy, disability or neglect, provided that such designation shall not be made where the power to appoint a deputy county treasurer exists, and where the county treasurer does not fail or neglect to appoint such deputy. The appointment of the special deputy commissioners hereinbefore provided for the counties of Westchester, Albany, Rensselaer, Schenectady, Oneida and Onondaga, shall not take effect until the expiration of the term of the county treasurer in office in each of said counties on the thirteenth day of May, nineteen hundred and seven.

This section was derived from the Liquor Tax Law of 1896, § 9, as amended by L. 1897, ch. 312, § 4; L. 1898, ch. 167, § 1; L. 1899, ch. 434, § 1; L. 1900, ch. 257, § 1; L. 1903, ch. 486, § 3, and L. 1908, ch. 63, together with the provisions of L. 1907, ch. 345, §§ 3, 7. It was amended to read as above by L. 1913, ch. 782, and L. 1916, ch. 122. The amendment by L. 1913, ch. 782 related to special deputy commissioner in Orange county. The amendment by L. 1916, ch. 122 related to special deputy commissioners for Broome and Nassau counties.

Section 6 of the Liquor Tax Law of 1896 is now covered by section 3.

Deputies as state officers.—A special deputy commissioner of excise for a particular county is not a state officer. People v. Judson, (1908) 59 Misc. 538, 112 N. Y. S. 408.

§ 7. Duties, powers, salaries and expenses of special agents; attorneys. The state commissioner of excise shall appoint not more than sixty special agents, each of whom shall receive the salary herein prescribed, payable in equal monthly instalments, together with the necessary expenses incurred by direction of the state commissioner in the performance of the duties of his office, or the state commissioner of excise, in his discretion, may fix a per diem allowance for subsistence, to be audited and allowed at not more than three dollars per day, nor

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less than one dollar per day, together with such other necessary expenses as shall be incurred by the agent in the performance of the duties of his office by direction of the state commissioner; provided that no per diem allowance for subsistence shall be audited or paid to any agent for any day or days during which the agent shall be engaged in official work in the city, borough, village or town in which he resides. Each of such special agents shall execute and file in the office of the state comptroller a bond to the people of the state in such sum and with such sureties as the commissioner shall require, conditioned for the faithful performance of the duties of his office. Such special agents shall be deemed the confidential agents of the state commissioner, and shall, under the direction of the commissioner, and as required by him, investigate all matters relating to the collection of liquor taxes and penalties under this chapter and in relation to the compliance with law by persons engaged in the traffic in liquors; and perform all duties as to the search and seizure of liquors set forth in section thirty-three of this chapter. Any such special agent may enter any place where liquors are sold at any time when the same is open, and may examine any liquor tax certificate granted or purported to have been granted in pursuance of law. He may, at any time between six o'clock in the morning and six o'clock in the evening, or any other time when the same are open, enter any uncertificated premises to search for and seize liquors as provided in section thirty-three of this chapter; he may execute warrants issued and directed to him as provided in said section, and perform all acts authorized therein. He may investigate any other matters in connection with the sale of liquor and shall, under the direction of the state commissioner, make verified complaints of criminal violations of this chapter investigated by him, and forward the same to the state commissioner for examination, and if approved, to be by him certified and forwarded to the district attorney for prosecution as provided in the case of other officers in section forty hereof. He shall be liable for penalties as provided in section forty-one of this chapter, for neglect by public officers. Each special agent now in office or hereafter appointed shall receive an annual salary of one thousand dollars until he shall have served one year from the date of his appointment; thereafter he shall receive an annual salary of twelve hundred and fifty dollars until he shall have served two

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years from the date of his appointment; and thereafter he shall receive an annual salary of fifteen hundred dollars. The state commissioner may employ necessary counsel in the department of excise, and may likewise designate and appoint an attorney or attorneys to represent him or to act with the special deputy, special agent or county treasurer in the prosecution or defense of any action or proceeding brought under the provisions of this chapter. They shall be paid by the state treasurer, on the warrant of the comptroller, such compensation as shall be agreed upon by the state commissioner. All officers appointed or employed under the provisions of this section or sections five or six of this chapter may be removed by the state commissioner, who may appoint their successors as provided by law. The state commissioner of excise may, whenever in his judgment the ends of justice will be promoted thereby, by an instrument in writing under his hand and official seal, upon the written request of the district attorney of any county, designate and appoint an attorney and counselor of the supreme court to act with, or for, and in the place of the district attorney in the investigation before a magistrate, and in the trial of any person or persons charged with a violation of this chapter in any court having jurisdiction thereof. The attorney and counselor so appointed shall have and possess all of the powers and authority of the district attorney under this chapter, or conferred by the provisions of the code of criminal procedure, or of the penal law of this state in respect to the investigation, prosecution and trial of the case or cases specified in such certificate of appointment, and may as assistant district attorney under this chapter issue subpœnas requiring the attendance of witnesses before a magistrate, or upon the trial of any person under indictment, or charged with any violation of this chapter. The compensation and disbursements of an assistant to a district attorney appointed by the state commissioner of excise shall be paid by the county treasurer of the county, or comptroller or fiscal officer of the city to which such designation applies, upon the warrant of the state commissioner of excise, but such warrant shall not be drawn until the attorney so designated shall present a duplicate itemized account to the state commissioner of excise for compensation and disbursements, duly verified, which account shall be audited and approved by the state commissioner in such sum as he deems reasonable and proper,

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and his warrant upon the county treasurer, city comptroller or fiscal officer shall be in the amount of the account presented as audited and allowed by him. If such treasurer, comptroller or fiscal officer has no funds in his hands applicable to the payment of such warrant, he shall at once borrow enough money upon the credit of the county, and is hereby authorized so to do, to pay said warrant and shall immediately pay the same.

This section was derived from the Liquor Tax Law of 1896, § 10. It was amended to read as above by L. 1909, ch. 281, § 2. The amendment changed and corrected the references to sections 39 and 40, making them read sections 40 and 41.

Section 7 of the Liquor Tax Law of 1896 is now covered by section 4.

When state commissioner entitled to notice of all proceedings and service with copies of all papers: see supra, § 3.

Investigation by agents.—By virtue of the provisions of this section special agents are authorized to investigate all matters in relation to the compliance with law by persons engaged in the traffic in liquor, and to investigate all other matters in connection with the sale of liquor. The methods to be adopted in the course of such investigation are not specially defined or limited by the statute, and it was doubtless the intention of the legislature to leave to the state officials making such investigations the largest discretion and latitude in respect to the methods to be adopted by them, provided, of course, such methods do not interfere with any of the rights of the parties whose acts are under investigation. Lyman v. Oussani, (1900) 33 Misc. 409, 68 N. Y. S. 450, reversed on other grounds, 65 App. Div. 27, 72 N. Y. S. 498.

Duties.— "The duties of special agents are prescribed by statute. They are confidential agents of the State Commissioner, and at his direction are required to investigate, among other things, whether the Liquor Tax Law is being violated. . . . If it is being violated, then they are to secure the necessary evidence to establish that fact." Farley v. Bronx Bath, etc., Co., (1914) 163 App. Div. 459, 148 N. Y. S. 579.

Supervisor as special agent.— The office of supervisor of a town and that of special agent are incompatible; and, when a supervisor accepts an appointment as such an agent, he *ipso facto* vacates his former office. Op. Atty.-Gen. (1897) 259.

Civil service.— The refusal of the state civil service commission to place the position of special agent of the department of excise in the non-competitive class, is not so palpably erroneous as to justify the Appellate Division in interfering therewith; and, where the commissioner of excise has assumed to dismiss summarily an incumbent of that position who is a veteran, a peremptory writ of mandamus will issue to compel the commissioner of excise to reinstate him. People v. Farley, (1911) 147 App. Div. 420, 131 N. Y. S. 931, affirming 72 Misc. 438, 131 N. Y. S. 144, affirmed (1912) 204 N. Y. 676, 98 N. E. 1113. And see generally CIVIL SERVICE LAW, § 22 and note. The civil service commission cannot under the Civil Service Act of 1883, strike from the list of persons eligible for appointment as a special agent, on account of his age and physical condition, a veteran of the Civil War who has been examined and regularly placed on the list. People v. Cobb, (1897) 13 App. Div. 56, 43 N. Y. S. 120. The action of the state civil service commission in placing the position of special agent in the competitive class, is final, and the courts will not strike the position from such class. Matter of Farley, (1911) 73 Misc. 555, 131 N. Y. S. 353. Prior to this decision it was held that a special agent under the Liquor Tax Law

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of 1896 was held to be a confidential officer, and not within chapter 821 of the Laws of 1896 promoting the appointment and retention of veterans in the civil service of the state. People v. Lyman, (1898) 157 N. Y. 368, 52 N. E. 132, affirming 30 App. Div. 135, 50 N. Y. S. 444, 51 N. Y. S. 641, affirming 20 Misc. 80, 44 N. Y. S. 1084. In the opinion by the Court of Appeals, it was said: "When we read the provisions of section ten of the Liquor Tax Law, which declare that a special agent shall be deemed the confidential agent of the state commissioner, and ascertain the duties he is required to discharge under the immediate direction of the commissioner, it becomes manifest that they are of a confidential character. His acts are official acts performed for and in the name of the commissioner, and are not only secret, but they also involve trust and confidence which are personal to the appointing officer. The duties cast upon the special agent involve skill, integrity, and liability personal to the officer he represents, and the relations between the excise commissioner and the special agent fall plainly within the principle of the previous decisions of this court upon the subject."

See generally, CIVIL SERVICE LAW, § 13, and note.

Special agents as public detectives.—A special agent is a public and official detective, as distinguished from a private detective: Cullinan v. Furthman, (1907) 187 N. Y. 160, 79 N. E. 989. Special agents are not detectives within the rule that the evidence of private detectives is subject to careful scrutiny by the jury. Cullinan v. Trolley Club, (1901) 65 App. Div. 202, 72 N. Y. S. 629, wherein it was said: "There is a marked distinction between a public officer, charged with the duty of seeing that the laws are enforced and vested with power and authority to investigate violations of the law, and a private detective, hired to procure evidence of the violation of law at the instance and for the benefit of private persons." And see to the same effect: Cullinan v. Rorphuro, (1904) 93 App. Div. 200, 87 N. Y. S. 570.

Special agents as gamblers.— Special agents operating a slot machine in a saloon for the purpose of securing evidence to establish a violation of the law, are not gamblers. Clement v. Belanger, (1907) 120 App. Div. 662, 105 N. Y. S. 537.

Special agents as accomplices.—A special agent procuring unlawfully the sale of liquor on Sunday is not an accomplice in the commission of the crime, and it is not necessary to corroborate his evidence as a matter of law. Farley v. Bronx Bath, etc., Co., (1914) 163 App. Div. 459, 148 N. Y. S. 579.

Purchase of liquors by special agent.— To procure evidence, a special agent may purchase liquors of a certificate holder at a prohibited hour; and, even if such purchase was beyond his power, it would not estop the state from recovering on the bond of the holder. Lyman v. Oussani, (1900) 33 Misc. 409, 68 N. Y. S. 450, reversed on other grounds 65 App. Div. 27, 72 N. Y. S. 498. In an action on the bond of a certificate holder for an unlawful sale of liquors, it is error for the trial court to refuse to charge that it is not unlawful for special agents to purchase liquors at times when it is unlawful for the holder of the certificate to sell the same. Clement v. Stratton, (1909) 136 App. Div. 83, 120 N. Y. S. 624.

Weight of evidence.— "Special agents are public officers engaged in the performance of duties prescribed by statute, and should not be treated by the courts or juries as private detectives, or with the suspicion that is associated with mere spotters, paid informers, and those who are given compensation dependent upon certain results being obtained. Neither should the relation of special agents be wholly withdrawn from the consideration of the jury. Where a special agent whose duty it is to discover and establish the commission of crime, procures the sale of liquor to himself at a prohibited time for the purpose and with the intent of making a report of such violation to the commissioner of excise, and thereafter upon such

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report an action or proceeding is brought which depends for its successful termination upon the testimony of such agent, it is possible that the agent may become somewhat partisan, or biased in favor of the plaintiff and against the defendant to such an extent that consciously or unconsciously he will exaggerate the evidence against the accused and disregard or overlook the evidence that would tend in his favor. . . . Where the testimony of special agents is wholly uncontradicted and it is reasonable and probable, it is sufficient in a civil action upon which to direct a verdict in accordance therewith. . . . Where their testimony is contradicted, or it is unreasonable or improbable, the weight to be given to such testimony must be left to the jury." Cullinan v. Furthman, (1907) 187 N. Y. 160, 79 N. E. 989.

Weight of uncontradicted evidence.— Where, in an action to recover the penalty of a bond based on the unlawful sale of liquors on Sunday, the evidence of the agents as to the unlawful sale is unimpeached and uncontradicted, a verdict in favor of the defendants should be set aside as against the weight of evidence. Cullinan v. Rorphuro, (1904) 93 App. Div. 200, 87 N. Y. S. 570. "Where the testimony of special agents is wholly uncontradicted and it is reasonable and probable, it is sufficient in a civil action upon which to direct a verdict in accordance therewith." Cullinan v. Furthman, (1907) 187 N. Y. 160, 79 N. E. 989.

Witness fees of special agent.—A special agent is not required by this section to take any part in a prosecution by a district attorney for a violation of the statute; and, when he is subpœnaed to testify before a grand jury, he is entitled to witness fees. People v. Hull, (1898) 23 Misc. 63, 50 N. Y. S. 463. See, to the contrary, Op. Atty.-Gen. (1896) 241.

Semi-monthly payment of special agents.— Under chapter 317 of the Laws of 1910, special agents should receive semi-monthly payment of their salaries. Op. Atty.-Gen. (1910) 758.

Per diem allowance for subsistence of agents.— The commissioner of excise cannot fix under this section a per diem allowance for the subsistence of special agents, to be paid out of the moneys appropriated by section 432 of the Laws of 1909, section 2 of such appropriation act forbidding such payments. Op. Atty.-Gen. (1910) 513.

§ 8. Excise taxes upon the business of trafficking in liquors; enumeration. Excise taxes upon the business of trafficking in liquors shall be of seven grades, and assessed as follows:

1. Upon the business of trafficking in liquors to be drunk upon the premises where sold, or which are so drunk, whether in a hotel, restaurant, saloon, store, shop, booth or other place, or in any outbuildings, yard or garden appertaining thereto or connected therewith, there is assessed an excise tax to be paid by every person engaged in such traffic, and for each such place where such traffic is carried on by such person if the same be in a city or borough having by the last state census a population of fifteen hundred thousand or more, the sum of fifteen hundred dollars; if in a city or borough having by said census a population of less than fifteen hundred thousand, but more than five hundred thousand, the sum of twelve hundred and eighteen and one-half dollars; if in a city or borough having by said census a population of

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less than five hundred thousand, but more than fifty thousand, the sum of nine hundred and thirty-seven and one-half dollars; if in a city or village having by said census a population of less than fifty thousand, but more than ten thousand, the sum of six hundred and fifty-six dollars; if in a city or village having by said census a population of less than ten thousand, but more than five thousand, the sum of five hundred and sixty-two and one-half dollars; if in a village having by said census a population of less than five thousand, but more than twelve hundred, the sum of three hundred and seventy-five dollars; if in any other place, the sum of one hundred and eighty-seven and one-half dollars. The holder of a liquor tax certificate under this subdivision is entitled also to traffic in liquors as though he held a liquor tax certificate under subdivision two of this section, subject to the provisions of section thirteen of this chapter.

2. Upon the business of trafficking in liquors in quantities less than five wine gallons, no part of which shall be drunk on the premises where sold, or in any outbuilding, yard, booth or garden appertaining thereto or connected therewith, there is assessed an excise tax to be paid by every person engaged in such traffic, and for each such place where such traffic is carried on by such person, if the same be in a city or borough having by the last state census a population of fifteen hundred thousand or more, the sum of nine hundred and thirty-seven and one-half dollars; if in a city or borough having by the said census a population of less than fifteen hundred thousand, but more than five hundred thousand, the sum of seven hundred and fifty dollars; if in a city or borough having by said census a population of less than five hundred thousand, but more than fifty thousand, the sum of five hundred and sixty-two and one-half dollars; if in a city or village having by said census a population of less than fifty thousand, but more than ten thousand, the sum of three hundred and seventy-five dollars; if in a city or village having by said census a population of less than ten *thosuand, but more than five thousand, the sum of one hundred and eighty-seven and one-half dollars; if in a village having by said census a population of less than five thousand, but more than twelve hundred, the sum of one hundred and forty and one-half dollars; if in any other place the sum of ninety-three and one-half dollars. The holder of a liquor tax certificate under

* So in original.

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this subdivision, who is a duly licensed pharmacist, and the corporation, association or copartnership of which he is a member is subject to the provisions of exception one of section thirty, and to the provisions of section thirteen of this chapter.

3. Upon the business of trafficking in liquors by a duly licensed pharmacist, which liquors can be sold only upon the written prescription of a regularly licensed physician, signed by such physician, which prescription shall state the date of the prescription, the name of the person for whom prescribed, and shall be preserved by the vendor, pasted in a book kept for that purpose, and be but once filled, and which liquors shall not be drunk on the premises where sold, or in any outbuilding, yard, booth or garden appertaining thereto or connected therewith, there is assessed an excise tax to be paid by such duly licensed pharmacist or the corporation, association or copartnership of which he is a member, engaged in such traffic, and for each such place where such traffic is carried on by such pharmacist, or by such corporation, association or copartnership of which he is a member, the sum of nine and one-half dollars for each excise year, or any part thereof. The holder of a liquor tax certificate under this subdivision may sell alcohol to be used for medicinal or mechanical purposes, without a prescription, except during prohibited hours.

4. Upon the business of trafficking in liquors upon any car, steamboat or vessel within this state, to be drunk on such car or on any car connected therewith, or on such steamboat or vessel, or upon any boat or barge attached thereto, or connected therewith there is assessed an excise tax, to be paid by every person engaged in such traffic, and for each car, steamboat or vessel, boat or barge, upon which such traffic is carried on, the sum of three hundred and seventy-five dollars.

5. The holder of a liquor tax certificate under subdivision two of this section, who is engaged in the business of bottling malt liquors, or who bottles the same, and who sells such malt liquors at any place other than that stated in such liquor tax certificate, in quantities of less than five wine gallons, may sell and deliver from a vehicle to the occupant of a store or other building at such place of occupancy, malt liquors in bottles in a quantity of less than five wine gallons, but of not less than three gallons (or twenty-four pint bottles) at a time, provided he shall have

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obtained for each vehicle from which he so sells and delivers a special tax certificate permitting such traffic from such vehicle. There is assessed for each vehicle so employed an excise liquor tax of one hundred and eighty-seven and one-half dollars. The state commissioner of excise shall prepare and issue such special liquor tax certificate as shall be necessary to carry out the provisions of this subdivisions, and such certificate shall at all times be carried with each such vehicle, or posted therein or thereon, in such manner as the state commissioner of excise shall direct. No sale or delivery of malt liquor under the provisions of this subdivision shall be permitted in any town in which, under section thirteen of this chapter, the sale of liquor, under subdivision two of this section, is prohibited.

6. Upon the business of trafficking in alcohol in quantities of less than five gallons, which alcohol can be sold only between the hours of seven o'clock in the morning and seven o'clock in the evening, on any day except Sunday, for use for mechanical, medicinal or scientific purposes, by dealers who neither keep nor sell any liquors of any kind other than alcohol, there is assessed an excise tax to be paid by every person engaged in such traffic, and for each such place where such traffic is carried on by such person, if the same be in a city having by the last state census a population of fifteen hundred thousand or more, the sum of forty-seven dollars; if in a city having by said census a population of less than fifteen hundred thousand, but more than five hundred thousand, the sum thirty-seven and one-half dollars; if in a city having by said census a population of less than five hundred thousand, but more than fifty thousand, the sum of twenty-eight dollars; if in a city or village having by said census a population of less than fifty thousand, but more than ten thousand, the sum of eighteen and one-half dollars; if in any other place, the sum of nine and one-half dollars. No liquor tax certificate issued under subdivisions three, five, six or seven of this section, shall be transferred or assigned, and no rebate shall be allowed or paid upon the surrender or cancellation thereof.

7. Upon the business of trafficking in liquors in quantities of less than five wine gallons, but not less than two wine gallons, in any town, by a grower of fruit therein, or a manufacturer of any liquor produced solely therefrom in such town, which liquor can be sold only between the hours of seven o'clock in the morning

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and seven o'clock in the evening on any day, except Sunday, no part of which shall be drunk on the premises where sold, or in any outbuilding, yard, booth or garden appertaining thereto or connected therewith, and no part of which liquor shall be sold to or for any resident of said town, except the holder of a liquor tax certificate under subdivision three of this section, in case traffic in liquors therein to be drunk on the premises where sold is prohibited as the result of a vote on local option pursuant to section thirteen of this chapter, there is assessed an excise tax to be paid by every person engaged in such traffic, and for each such place where such traffic is carried on, the sum of ninety-three and one-half dollars for each excise year or any part thereof, during which such traffic is carried on, and no liquor tax certificate issued under this subdivision shall be transferred or assigned, and no rebate shall be allowed or paid upon the surrender or cancellation thereof.

8. *Enumeration.* When the population of a city or village is not shown by the latest state census, it shall be determined for the purposes of this chapter by the latest United States census, and if not shown by reason of a change in boundaries or the incorporation of a new city or village, or by reason of not having been separately enumerated, the state commissioner of excise is authorized and directed, in his discretion, to cause an enumeration of the inhabitants to be taken in such city or village. He may also cause to be taken an enumeration of the inhabitants of any hamlet or unincorporated village, after first having established a limit or boundary line around such hamlet or unincorporated village, within which limit or boundary line such enumeration may be taken. Whenever a limit or boundary line shall have been established around any hamlet or unincorporated village such limit or boundary line shall be described and certified to by the state commissioner of excise and be entered of record and become part of the records of the state department of excise, and such limit or boundary line shall not be changed for a period of five years after the date of recording the same, unless such hamlet or unincorporated village become an incorporated village, with corporate limits and boundary lines different from those established by the state commissioner of excise, in which case such newly incorporated village may be enumerated as hereinbefore provided in this section. If, since the latest state enumeration was taken, the boun-

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daries of the city shall have been changed by the addition of territory not in the same judicial district, such annexed territory shall not be deemed to be a part of such city for the purposes of determining the amount of excise tax assessed therein by this chapter; but the inhabitants of such annexed territory shall be enumerated for purposes of so determining such excise tax and, except as to the amount of the excise tax so determined, all the provisions of this chapter shall be applicable to such annexed territory and the excise tax assessed in such annexed territory shall be paid to the city to which such territory shall have been annexed. The amount of excise tax in every place in this state shall, until changed by an enumeration authorized by the state commissioner of excise, or by an increase or decrease of population shown by subsequent state or United States census, be as provided in subdivisions one, two and six of this section, for places containing the same population. The excise taxes assessed under this chapter in cities containing a population of fifteen hundred thousand or more, which are or shall be formed by the consolidation of territory situate in one or more counties, shall be assessed in the several boroughs or portions of the territory so consolidated to form such city at an advance of seven-eighths in the rate over the amount at which such taxes were assessed on the thirty-first day of December, nineteen hundred and two, in the several portions of the territory so consolidated. The state commissioner of excise shall immediately certify the result of an enumeration taken by him under the provisions of this chapter to the treasurer or special deputy commissioner of the county or borough in which the territory so enumerated by him or any part thereof is situated, which certificate shall be evidence of the facts therein stated. If there be more than one bar, room or place on the premises, car, steamboat, vessel, boat or barge, at which the traffic in liquors is carried on under any subdivision of this section, a like additional tax is assessed for each such additional bar, room or place.

9. *Issuance of certificates.* No liquor tax certificate shall hereafter be issued for traffic in liquors, under the provisions of subdivision one of this section, for any premises in any town, village, borough or city, unless or until the ratio of population therein, to the number of certificates issued under the provisions of said subdivision one, shall be greater than seven hundred and fifty to one, and then only pursuant to the provisions of this subdivision;

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but this prohibition shall not apply to any premises in which such traffic in liquors was lawfully carried on at some time within one year immediately preceding the passage of this act, provided such traffic was not abandoned thereat during the said period, or to any premises that have been continuously occupied for a hotel from and including the twenty-third day of March, eighteen hundred and ninety-six; nor shall this prohibition apply to any premises in which, during said period of one year, or any part thereof, such traffic in liquors was suspended because of the result of a vote on the local option questions; nor to any premises in which during said period of one year, or any part thereof, such traffic in liquors was prohibited because the certificated premises were suffered and permitted to become disorderly, or that gambling was allowed therein, as provided in subdivision four of section twenty-three of this chapter; nor to any premises in which, during said period of one year, or any part thereof, such traffic in liquors has been temporarily suspended, but not abandoned. Nor shall this prohibition apply to such traffic in liquors in connection with the business of keeping a hotel, provided the hotel building in which such traffic shall be carried on shall conform to all the requirements of clause N of section thirty of this chapter, relative to a hotel situate in a city, incorporated village of twelve hundred or more inhabitants, or within two miles of the corporate limits of either, except that, instead of having ten bedrooms above the basement, exclusive of those occupied by the family and servants, such hotel building shall contain not less than one hundred such bedrooms. Provided, however, that at any time during the unexpired term of any liquor tax certificate issued for traffic in liquors under the provisions of subdivision one of this section in any premises in which such traffic may lawfully be carried on, a notice stating that such traffic in liquors is abandoned at the premises named in such certificate may be filed with the county treasurer or special deputy commissioner of excise of the county or borough in which the certificated premises are located, which notice shall also particularly describe some other premises in which it is intended to carry on such traffic, which premises shall be situated in the same city, borough, village or town as that in which the abandoned premises are located. In the case of a hotel, other than a hotel containing less than fifty such bedrooms in cities of the first class, such notice shall be in

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writing and executed and acknowledged by the certificate holder and the owner or owners of the certificated premises and by any person to whom such certificate may have been transferred or assigned as collateral security for moneys loaned or any other obligation incurred; and in all other cases such notice shall be in writing and executed and acknowledged by the certificate holder or by his duly authorized attorney and by any person to whom such certificate may have been transferred or assigned as collateral security for moneys loaned or any other obligation incurred; but in any case such notice shall be null and void unless within sixty days from the filing thereof such traffic in liquors shall be lawfully carried on at the premises described in such notice as the premises in which it is intended to carry on such traffic, and continued thereat for a period of not less than sixty days, and the filing of a notice that becomes null and void shall not be deemed an abandonment of the traffic at the premises described in such liquor tax certificate. After the filing of such notice as aforesaid, the prohibition herein contained shall not apply to the premises described in such notice as the premises in which it is intended to carry on such traffic, provided that an application for a certificate to carry on such traffic in liquors thereat shall be made in due form to the proper officer, within sixty days from the filing of such notice, and provided further that such traffic is continuously thereafter carried on at said premises for a period not less than sixty days. Except in a case where such notice becomes null and void as aforesaid, no liquor tax certificate for traffic in liquors under the provisions of subdivision one of this section shall thereafter be issued for, and it shall be unlawful to so traffic in liquors in the premises described in such notice as the premises in which the traffic in liquors has been abandoned, unless there shall subsequently be filed another notice of abandonment, in the manner herein provided, which notice shall describe such first abandoned premises as the premises in which it is intended to again carry on such traffic in liquors. Whenever the ratio between the population of any city, borough, village or town and the number of such premises situate therein for such traffic in liquors to which this prohibition does not apply, shall exceed the ratio of seven hundred and fifty to one, additional certificates for traffic in liquors under the provisions of subdivision one of this section may be issued, as provided in this chapter, in the

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manner following: The certificate issuing officer of the county or borough in which any such city, borough, village or town is situated, shall, upon the written request of any person who states that he desires to traffic in liquors therein under the provisions of subdivision one of this section, give public notice that on a certain day named he will receive bids in writing, at his office, from all persons who desire to so traffic in liquors, such bids to contain the name of the person who desires to procure a liquor tax certificate, the location of the proposed certificated premises, and the amount that such person is willing to pay in order to so traffic in liquors. Each bid shall be accompanied by an application, in due form, for such certificate for the premises described, which shall include an application statement and bond, as provided in sections fifteen and sixteen of this chapter, and the amount named in the bid, in the form of a certified check, which amount shall at least equal the tax assessed upon such traffic in such city, borough, village or town; and the bid, together with the application for the certificate, shall be inclosed in one envelope, securely sealed, and addressed to the certificate issuing officer. In the case of a city or borough, such notice shall be published at least three days before the day named therein for receiving bids, once in one newspaper published in such city or borough, and such notice shall also be printed in large display type and prominently posted up in the office of the certificate issuing officer, at least ten days before the day appointed for receiving bids. In the case of a village or town, such notice shall be published at least five days before the day named for receiving bids, in one newspaper published in the county in which such village or town is situated, which shall be a newspaper published in such village or town, if there be one, and such notice shall also be printed and posted in at least five public places in such village or town at least ten days before the day so appointed for receiving bids. On the day so appointed for receiving bids in the case of any such city, borough, village or town, the certificate issuing officer shall receive all bids that may be submitted to him as herein prescribed, and on the following day shall, at his office, and at a time to be specified in the notice aforesaid, publicly open each and all of such bids submitted, and as soon thereafter as possible prepare a list which shall contain the name of each person who submitted a valid bid, together with the amount thereof, which list shall be

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a public record. Certificates shall thereupon be issued pursuant to the provisions of this chapter to the persons who made the highest bids therefor, and otherwise complied with the requirements of this section, but only upon the basis of one certificate for each seven hundred and fifty population in excess of the ratio herein prescribed, the issuance of such certificates to be made in order to the highest bidder therefor, who comply with all such requirements. In any town or village having a population less than seven hundred and fifty, and in which there are no premises to which the prohibition contained in this subdivision does not apply, one liquor tax certificate for traffic in liquors under subdivision one of this section may, if such traffic is permissible, be issued to the person who shall offer to pay the highest amount for the right to traffic under such certificate, provided such amount shall at least equal the tax assessed upon such traffic in such town or village. For the purpose of determining who is the highest bidder for such right to traffic, the certificate issuing officer shall, upon written request, give public notice that on a certain day named he will receive bids in writing from all persons who desire to so traffic in liquors, and all the foregoing provisions contained in this subdivision relative to bidding for the right to traffic in liquors in any town or village shall be applicable to bids for the right to traffic in such town or village having a population less than seven hundred and fifty.

10. *Issuance of certificates under the provisions of subdivision two of this section.* No liquor tax certificate shall hereafter be issued for traffic in liquors, under the provisions of subdivision two of this section, for any premises in any town, village, borough or city, unless or until the ratio of population therein, to the number of certificates issued under the provisions of said subdivision two, shall be greater than seven thousand five hundred to one, and then only pursuant to the provisions of this subdivision; but this prohibition shall not apply to any premises in which traffic in liquors under the provisions of subdivision two of this section was lawfully carried on at some time within one year immediately preceding the passage of this act, provided such traffic was not abandoned thereat during said period or to any premises that have been continuously occupied for a hotel from and including the twenty-third day of March, eighteen hundred and ninety-six; nor shall this prohibition apply to any premises in which, during

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said period of one year, or any part thereof, such traffic in liquors was suspended because of the result of a vote on the local option questions; nor to any premises in which, during said period of one year, or any part thereof, such traffic in liquors was prohibited because the certificated premises were suffered and permitted to become disorderly, or that gambling was allowed therein, as provided in subdivision four of section twenty-three of this chapter; nor to any premises in which, during said period of one year, or any part thereof, such traffic in liquors has been temporarily suspended, but not abandoned. Provided, however, that at any time during the unexpired term of any liquor tax certificate issued for traffic in liquors under the provisions of subdivision two of this section in any premises in which such traffic may lawfully be carried on, a notice stating that such traffic in liquors is abandoned at the premises named in such certificate may be filed with the county treasurer or special deputy commissioner of excise of the county or borough in which the certificated premises are located, which notice shall also particularly describe some other premises in which it is intended to carry on such traffic, which premises shall be situated in the same city, borough, village or town as that in which the abandoned premises are located. Such notice shall be in writing and executed and acknowledged by the certificate holder or by his duly authorized attorney and by any person to whom such certificate may have been transferred or assigned as collateral security for moneys loaned or any other obligation incurred. Such notice shall be null and void unless within sixty days from the filing thereof such traffic in liquors shall be lawfully carried on at the premises described in such notice as the premises in which it is intended to carry on such traffic, and continued thereat for a period of not less than sixty days, and the filing of a notice that becomes null and void shall not be deemed an abandonment of the traffic at the premises described in such liquor tax certificate. After the filing of such notice as aforesaid, the prohibition herein contained shall not apply to the premises described in such notice as the premises in which it is intended to carry on such traffic, provided that an application for a certificate to carry on such traffic in liquors thereat shall be made in due form to the proper officer, within sixty days from the filing of such notice, and provided further that such traffic is continuously thereafter carried on at said

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premises for a period not less than sixty days. Except in a case where such notice becomes null and void as aforesaid, no liquor tax certificate for traffic in liquors under the provisions of subdivision two of this section shall thereafter be issued for, and it shall be unlawful to so traffic in liquors in the premises described in such notice as the premises in which the traffic in liquors has been abandoned, unless there shall subsequently be filed another notice of abandonment, in the manner herein provided, which notice shall describe such first abandoned premises as the premises in which it is intended to again carry on such traffic in liquors. Whenever the ratio between the population of any city, borough, village or town, and the number of such premises situated therein for such traffic in liquors to which this prohibition does not apply, shall exceed the ratio of seven thousand five hundred to one, additional certificates for traffic in liquors under the provisions of subdivision two of this section may be issued to the highest bidder therefor, in the same manner as is provided in subdivision nine of this section for the issuance of additional certificates under the provisions of subdivision one of this section.

This section was derived from the Liquor Tax Law of 1896, § 11, as amended by L. 1897, ch. 312, § 6; L. 1900, ch. 367, § 1; L. 1901, ch. 640, § 2; L. 1903, ch. 115, § 1.

The first paragraph of the section was amended by L. 1909, ch. 281, § 3, by changing the number of grades from six to seven.

Subdivision 1 was amended to read as above by L. 1909, ch. 281, § 3, and by L. 1916, ch. 416, § 1. The amendment by L. 1909 struck out the words "corporation, association, copartnership" before the word "person". The amendment by L. 1916 changed and increased the rate and amount of the excise tax.

Subdivision 2 was amended to read as above by L. 1909, ch. 281, § 3, and L. 1916, ch. 416, § 1. The amendment by L. 1909, struck out the words "corporation, association, copartnership" before the word "person." The amendment by L. 1916 changed and increased the rate of the excise tax.

Subdivision 3 was amended by L. 1910, ch. 485, § 2, and L. 1916, ch. 416, § 2. The amendment by L. 1910 added the words "for each excise year or any part thereof" at the end of the next to the last sentence. The amendment by L. 1916 changed and increased the rate and amount of the excise tax.

Subdivision 4 was amended to read as above by L. 1909, ch. 281, § 3, and L. 1916, ch. 416, § 3. The amendment by L. 1909 struck out the words "corporation, association or copartnership," before the word "person." The amendment by L. 1916 increased the rate and amount of the excise tax.

Subdivision 5 was amended to read as above by L. 1916, ch. 416, § 3 changed and increased the rate and amount of the excise tax.

Subdivision 6 was amended to read as above by L. 1909, ch. 281, § 3, and L. 1916, ch. 416, § 3. The amendment by L. 1909 struck out the words "corporation, association or copartnership" before the word "person" and made the references to subdivisions in the last sentence include subdivision 7. The amendment by L. 1916 changed and increased the rate and amount of the excise tax.

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Subdivision 7 was amended to read as above by L. 1909, ch. 281, § 3, and L. 1916, ch. 416, § 3. The amendment by L. 1909 struck out the words "corporation, association or copartnership" before the word "person." The amendment by L. 1916 changed and increased the rate of the excise tax.

Subdivision 8 was amended to read as above by L. 1910, ch. 485, § 3, and L. 1916, ch. 416, § 4. The amendment by L. 1910, added the words "a change of boundaries or" following the word "reason," in the first sentence. The amendment by L. 1916 struck out the words "remain the same as assessed for the year eighteen hundred and ninety-nine" which formerly followed the word "shall" in the first part of the fifth sentence; changed the reading of that part of the fifth sentence following the words "United States census" which formerly read, "and such excise tax assessed in each place enumerated under this subdivision and assessed in each place where a change in the population is shown by the latest state and United States census shall be the same as that provided in subdivisions one, two, three and six of this section, for places containing the same population." It also changed the rate of advancement in the sixth sentence from "one-half" to "seven-eighths."

Subdivision 9 was added by L. 1910, ch. 494, § 1. It was amended to read as above by L. 1911, ch. 298, and L. 1915, ch. 654, § 1.

Subdivision 10 was added by L. 1913, ch. 168, § 1. It was amended to read as above by L. 1915, ch. 654, § 2, and L. 1916, ch. 416, § 5. Section 8 of the Liquor Tax Law is now covered by section 5.

Payment of tax: see infra, § 9. *Officers to whom tax is to be paid and how distributed:* see infra, § 10. *Payment of rebate on surrender of certificate:* see infra, § 24. *Payment of tax and issuance of certificate:* see infra, § 17. *State commissioner of excise to be made party to all actions and proceedings relative to issuance of certificates:* see supra, § 3. *Statements to be made upon application for liquor tax certificate:* see infra, § 15. *Bonds to be given:* see infra, § 16. *Restrictions on traffic in liquor in connection with other business:* see infra, § 20. *Corporations, associations, copartnerships or persons who or which shall not traffic in liquors:* see infra, § 21. *Places in which traffic in liquor shall not be permitted:* see infra, § 23. *Certiorari upon refusal to issue or transfer certificates:* see infra, § 27.

Affidavits of hotel-keepers holding liquor licenses: see ELECTION LAW, § 481. *Reports by police and certain departments of buildings in which liquor traffic is conducted:* see ELECTION LAW, § 483.

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Privilege or license to sell as subject of taxation: see 37 L. R. A. (N. S.) 455, note.

Amount of liquor-license fees as characterizing nature of statute or ordinance imposing it: see 14 L. R. A. (N. S.) 788, note.

License or tax as contrary to a constitutional provision prohibiting or restricting traffic in intoxicating liquor: see L. R. A. 1915C 10, note.

Validity of statute or ordinance imposing license tax on business of selling nonintoxicating liquors: see Ann. Cas. 1914C 841, note.

Right to discriminate between parts of a city as to amount of license fees for sale of intoxicating liquor: see 21 L. R. A. (N. S.) 192, note.

Running two saloons in one building under single license: see 2 L. R. A. (N. S.) 488, note. *Right of holder of one liquor license to conduct more than one place of business:* see 3 Ann. Cas. 1109 note.

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Effect of death of licensee on rights under liquor license: see Ann. Cas. 1915B 524, note.

Right of retail liquor dealer to deliver within license district, but outside of place designated in his license: see 14 L. R. A. (N. S.) 1142, note.

Before enactment of liquor laws.—Before the enactment of any statute imposing a tax on the liquor traffic, the traffic was free. Mayor v. Walker, (1815) 4 E. D. Smith 258.

Borough of Bronx.— After the amendment of the Liquor Tax Law in 1903, it was held that the rate for certificates under subdivision 1 was $1,200 for those issued in the borough of Bronx. People v. Hilliard, (1903) 40 Misc. 589, 83 N. Y. S. 21, affirmed 85 App. Div. 507, 83 N. Y. S. 204, affirmed on opinion below (1903) 176 N. Y. 604, 68 N. E. 1122.

Additional tax for 1915–1916.—"It is apparent that the legislature regarded these additional taxes as special taxes and not intended to be governed by the Liquor Tax Law except in the collection and assessment of the same. The act does not purport to be an amendment of the Liquor Tax Law, but was enacted 'To provide for the further taxation and regulation of the traffic in liquors under the Liquor Tax Law, for the year beginning October 1, 1915.' It makes special provision for the raising of the tax, it directs it all to be paid into the State Treasury. It only continues for one year, and makes no provision for a rebate. This one-quarter advance is not divided between the state and localities as the taxes are under the provisions of the Liquor Tax Law, and whether it can be called a special tax or not it would be manifestly unjust to require the localities to pay one-half of any rebates that might be made if the Liquor Tax Law is held to apply to the subject of rebate." Op. Atty.-Gen. (1915) 456, 459. As to the right to rebates on the additional amount paid under L. 1915, ch. 672, providing for this additional tax, see infra, § 24, note.

Hotel certificate.— The traffic in liquors must, in all cases, be confined to that particular line and character of traffic set forth in the application; and hence a certificate for traffic in connection with the keeping of a hotel will be canceled if the holder is not possessed of a hotel answering the statutory requirements. Matter of Ryon, (1903) 85 App. Div. 621, 83 N. Y. S. 123; Matter of Barnard, (1900) 48 App. Div. 423, 63 N. Y. S. 255. "The particular character of the traffic in liquors is determined by the application. The application and certificate must be interpreted together." Matter of Ryon, (1903) 85 App. Div. 621, 83 N. Y. S. 123.

"The character of the premises for the purpose of issuing a liquor tax certificate thereon must be determined from the application for such certificate; and if the premises are to be used as a hotel such application must state that fact; otherwise, no matter how full or ample its structural requirements may be, no liquor tax certificate can be issued conferring the privilege of conducting a hotel on such premises." People v. Hegeman, (1912) 75 Misc. 163, 135 N. Y. S. 90. As to the form of the application, see, infra, § 15.

License issued under Excise Law of 1892.— A license issued under the Excise Law of 1892 by the comptroller to common carriers was held by the attorney-general to remain in force for the term stated therein notwithstanding the repeal of such Excise Law by the Liquor Tax Law of 1896. Op. Atty.-Gen. (1896) 147.

Local option election favorable only to hotel certificates.— Where, at a local option election held under section 13, the vote is favorable to the issuance of certificates under the fourth proposition submitted relative to hotels, but is adverse on proposition two, relative to the sale of liquors not to be drunk on the premises, and pursuant to such vote a certificate is issued to a hotel proprietor under subdivision 1 of this section, the holder is not authorized to sell liquors not to be drunk on the premises. People v. Yarter, (1912) 152 App. Div. 566, 137 N. Y. S. 462.

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Liquors drunk on piazza.— A certificate under subdivision 2 does not authorize a sale of liquors to be drunk on an outside piazza of the building, though such piazza is on lands of the state. Matter of Lyman, (1898) 25 Misc. 638, 56 N. Y. S. 359.

Indictment.—An indictment for violation of subdivision 2 of this section must allege that the defendant had a license, in order to distinguish the case from a sale without a license, for which a greater penalty is provided. People v. Locatelli, (1910) 160 N. Y. S. 863. And conversely, on a prosecution under an indictment for a sale of liquors without a license, the defendant cannot be convicted of the crime of selling liquors to be drunk on the premises if he had a storekeeper's license to sell liquors not to be drunk on the premises. Huffstader v. People, (1875) 5 Hun 23. And, if this is the law as to the holder of the license, it is also the law as to his employee, who cannot under such an indictment be convicted for selling liquors to be drunk on the premises, if his employer was authorized to sell liquor to be drunk off the premises. People v. Buffum, (1882) 27 Hun 216. As to indictments for violations of the Liquor Tax Law, generally, see infra, § 35.

Punishment for violation.— Violation of this section by selling liquor to be drunk on the premises when the defendant has a license to sell liquor not to be drunk on the premises, is punishable as provided by subdivision 2 of section 36, infra. People v. Rolandelli, (1910) 160 N. Y. S. 766. See also People v. Locatelli, (1910) 160 N. Y. S. 863.

Cited.— This section was cited in the following cases: Bachmann-Bechtel Brewing Co. v. Gehl, (1913) 154 App. Div. 849, 139 N. Y. S. 807; Matter of Farley, (1912) 151 App. Div. 456, 135 N. Y. S. 869; Matter of Farley, (1914) 84 Misc. 594, 147 N. Y. S. 859, affirmed 163 App. Div. 953, 148 N. Y. S. 1115, affirmed (1914) 212 N. Y. 591 mem.; People v. Fappiano, (1912) 77 Misc. 613, 138 N. Y. S. 667; People v. Clement, (1911) 70 Misc. 587, 128 N. Y. S. 573.

In Halbert v. Gibbs, (1916) 16 App. Div. 126, 45 N. Y. S. 113, this section was cited in connection with the construction of sections 30, 33, infra. See infra, § 33, note.

II. Druggist License

Permission to pharmacists: see 7 L. R. A. 297, note.

Validity of statute regulating use and sale of liquor by druggists: see 10 Ann. Cas. 401, note.

Legality of sale of liquor by druggist as affected by element of intent or good faith: see Ann. Cas. 1912D 1345, note.

Right to use record of sales of liquor kept by druggist as evidence against him: see 20 Ann. Cas. 1182, note; 25 L. R. A. (N. S.) 818, note.

Must indictment or information for sale of liquor by druggists on prescription state name of purchaser: see 23 L. R. A. (N. S.) 583, note.

Peruna.— A certificate issued to a druggist authorizes him to sell liquors upon the prescription of a duly licensed physician, and to sell alcohol for medical purposes without a prescription, but does not authorize a sale of "Peruna" as a beverage. Clement v. Dwight, (1910) 137 App. Div. 389, 121 N. Y. S. 788. Whether "Peruna" and other patent medicines are liquors within the purport of the Liquor Tax Law, see supra, § 2.

Sale by druggist without prescription.— Evidence examined in an action by the commissioner of excise on the bond of a druggist for a sale of liquor without a prescription, and held that a verdict in favor of the defendant was against the weight of evidence. Cullinan v. Hosmer, (1905) 100 App. Div. 148, 91 N. Y. S. 607.

Admissibility of cash register slips.— In an action on the bond of a druggist based on an alleged sale of liquor without a doctor's prescription, where the witness for the plaintiff has testified that at the occasion in question he bought liquor and other articles and paid therefor the sum of ninety-

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six cents in cash, the druggist cannot introduce his cash register slips to show that a sale of ninety-six cents was not made on the day in question. Cullinan v. Moncrief, (1904) 90 App. Div. 538, 85 N. Y. S. 745.

Lost prescription.— Insufficient foundation for parol proof of a prescription upon which a druggist claimed to have sold liquors. Cullinan v. Hosmer, (1905) 100 App. Div. 148, 91 N. Y. S. 607.

III. Enumeration

Constitutionality.— A statute authorizing a special enumeration of the inhabitants of a territory annexed to a city for the purpose of determining the amount of the excise tax to be paid by those engaged in the business of selling liquors, is not unconstitutional. Matter of Hilliard, (1897) 1 Liq. Tax Law Rep. 229.

Object and use of enumeration.— The object of the enumeration provided by this section is to enable the commissioner of excise to fix the rate for the certificate. Killinger v. Clement, (1909) 131 App. Div. 461, 115 N. Y. S. 407. The enumeration, however, relates only to the enforcement of the Liquor Tax Law, and does not affect the question as to whether personal registration of voters is required. Op. Atty.-Gen. (1903) 447.

Extent of commissioner's power.— Under subdivision 8 of this section, the commissioner may make an enumeration where the population of a village is not shown by the census, but he is not given the arbitrary power, in the absence of an enumeration, to increase the tax according to his own ideas of the population. Matter of McGreivey, (1899) 37 App. Div. 66, 55 N. Y. S. 599, affirmed on opinion below (1900) 161 N. Y. 645, 57 N. E. 1116. And see Matter of Steenburgh, (1898) 24 Misc. 1, 53 N. Y. S. 197.

Certiorari to review right to make enumeration.— Certiorari will not lie to determine the right of the commissioner of excise to take an enumeration of the inhabitants of the city of Schenectady pursuant to this section and to increase the cost of liquor tax certificates in said city. People v. Cullinan, (1906) 111 App. Div. 32, 97 N. Y. S. 194.

Unincorporated village.— Under section 8, the commissioner of excise may include several hamlets within a single limit or boundary, if they are so close together as to constitute for all purposes of trade and association a single community; and he may take an enumeration of an unincorporated village partly within a town where traffic is prohibited and partly within a town where traffic is permitted. Matter of Lyman, (1899) 26 Misc. 629, 57 N. Y. S. 869.

Effect of new enumeration on tax already paid.— Where the tax was paid and a certificate was issued on April 20th to take effect on May 1st, a subsequent enumeration completed on the 25th of April, which requires a larger tax for certificates thereafter issued, does not have the effect of invalidating the certificate already issued. Matter of Hilliard, (1898) 25 App. Div. 222, 49 N. Y. S. 286, affirmed without opinion (1898) 155 N. Y. 702, 50 N. E. 1118.

Federal census.— The amount of the tax payable in the borough of Brooklyn is automatically advanced by the increase of population as shown by the federal census as well as by the increase shown by the state census. Matter of Ahlers, (1910) 141 App. Div. 891, 127 N. Y. S. 61, affirmed (1911) 201 N. Y. 592, 95 N. E. 1122. And see People v. Medberry, (1896) 17 Misc. 8, 39 N. Y. S. 207, holding that, for the purpose of determining the tax to be paid under subdivision of section 11 [section 8 of the present law] of the Liquor Tax Law of 1896, the population is to be determined solely by the last state or federal census.

Insufficient proof of federal census.— A certificate of the Chief of Census Division of the Department of Interior of United States, made after the assessment of a liquor tax, that a paper is a statement as nearly correct

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as can be ascertained from the population schedules of the population of certain villages therein named, is only a declaration of what such officer thinks is the best information he can extract from the population schedules, and is not competent proof of the census for the purposes of levying the liquor tax. Lyman v. McGreivey, (1898) 25 App. Div. 68, 48 N. Y. S. 1035, affirmed (1899) 159 N. Y. 561, 54 N. E. 1093.

Census by village officers.— An enumeration under the Village Law by the trustees of a village is not deemed a state census, and does not aid in fixing the amount of the tax. Matter of McGreivey, (1899) 37 App. Div. 66, 55 N. Y. S. 599, affirmed on opinion below (1900) 161 N. Y. 645, 57 N. E. 1116.

Inclusion of unincorporated village within boundaries of incorporated village.— If, after the establishment and enumeration of an unincorporated village pursuant to this section, a part thereof is annexed to an incorporated village, the amount of tax to be paid for a certificate issued for premises within such part is to be determined by the population of the incorporated village. People ex rel. Briggs v. Lyman, (1900) 48 App. Div. 484, 62 N. Y. S. 902, affirmed without opinion (1900) 163 N. Y. 602, 57 N. E. 1120.

Payment of excessive tax by mistake.—Where a certificate holder has paid the tax required in villages of over 1,200 population, and it appears that the population of such village was not fixed by the last state or federal census, and the holder thereupon demands the repayment of the excess of tax over that required of traffic in villages of less than 1,200 population, and the county treasurer, acting under the direction of the commissioner of excise, issues a rebate certificate to the holder for the excess, the commissioner of excise cannot subsequently question his right to payment of the rebate. People v. Lyman, (1899) 46 App. Div. 312, 61 N. Y. S. 655. But the certificate holder is not entitled to maintain an action against the county treasurer to recover the voluntary payment. Baker v. Bucklin, (1899) 43 App. Div. 336, 60 N. Y. S. 294, affirming 22 Misc. 560, 50 N. Y. S. 739.

Cited.— This section was cited in Op. Atty.-Gen. (1916) reported in 7 St. Dept. Rep. 503, in connection with, but as throwing no light on the meaning of, the word "census" as used in the Banking Law. See BANKING LAW, § 239 note, IV.

IV. RATIO OF CERTIFICATES

Change of location generally: see infra, § 25.

Validity of statute, ordinance, or order limiting number of saloons in municipality: see Ann. Cas. 1913E 365 note. *Discretion of local authorities as to the number of licenses to be granted for the sale of intoxicating liquors:* see 18 L. R. A. (N. S.) 386 note.

Constitutionality.— Subdivision 9 is not unconstitutional as an unjust discrimination, because the consent of the owners of certain hotels is required for the abandonment of the liquor traffic at the premises, while the consent of the owners of saloons is not required. Matter of Nyce, (1912) 139 N. Y. S. 204.

Object of ratio law.—"The object of the ratio law is not to reduce the number of places by arbitrarily depriving proper persons of liquor tax certificates validly issued and under which no violations of law have occurred. Subdivision 9 of section 8 is commonly referred to as a 'limitation law,' and that is what it is. It was intended to prevent any increase in the number of places licensed for the sale of liquors. It protected by suitable exceptions every place established at the time of its enactment. It did not provide for any decrease in the number of places. If it contemplated any decrease in the number of places, such decrease was to be accomplished by natural means, not by arbitrarily forcing certificates out of existence by curtailing the rights of transfer given by law." In re Marshall, (1916) 97 Misc. 492, 160 N. Y. S. 698.

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Meaning of "abandoned."— The word "abandoned" as used in subdivision 9 refers to an actual cessation of traffic in liquors, for there is no such thing known to the laws as an abandonment in connection with the transfer. Matter of Farley, (1912) 154 App. Div. 282, 138 N. Y. S. 1050, affirmed on opinion below (1913) 208 N. Y. 595, 102 N. E. 1102.

Power of certificate holder to abandon traffic as against property owner or lessee.— Except in the case of certain hotel premises, the power to abandon the traffic under subdivision 9 is lodged in the owner and holder of the certificate, not in the owner or lessee of the premises. Matter of Farley, (1915) 170 App. Div. 400, 155 N. Y. S. 1049; Matter of Farley, (1912) 154 App. Div. 282, 138 N. Y. S. 1050, affirmed on opinion below (1913) 208 N. Y. 595, 102 N. E. 1102. The tenant of saloon premises holding a certificate for traffic at the premises may abandon the traffic and preclude the owner from obtaining a certificate for subsequent traffic at such premises. McMahon v. Henkel, (1915) 91 Misc. 85, 153 N. Y. S. 915; Matter of Nyce, (1912) 139 N. Y. S. 204. But if the tenant has signed a lease with the owner to the effect that tenant waives the right to file a notice of abandonment and that such notice shall not be filed by him, he loses the right to transfer the traffic to other premises; and, if the tenant in such case files a notice of abandonment, the landlord may maintain an action in equity to set aside the notice. Brunner v. Diogenes Brewing Co., (1916) 93 Misc. 681, 158 N. Y. S. 607.

Abandonment of hotel traffic.— If a tenant's right to the use of a hotel building is not limited to hotel purposes, he may surrender a certificate for traffic in connection with the keeping of a hotel before its expiration and receive a saloon license; and then he will be in the position so that he will have the absolute right to file a certificate of abandonment under subdivision 9 and resume business at other premises. Young v. Rogers, (1913) 79 Misc. 117, 139 N. Y. S. 553. A notice of abadonment by the holder of a certificate is effective, though the owner of the premises does not join, where, though the premises have been used as a hotel, the particular certificate was not issued for traffic in a hotel and the holder had been practically evicted from the premises on account of alterations made in the buildings by the owner. Farley v. Dittman, (1913) 155 App. Div. 363, 140 N. Y. S. 321, affirmed without opinion (1914) 213 N. Y. 659, 107 N. E. 1077. The term "hotel" as used in subdivision 9 of this section, as well as in other sections of the Liquor Tax Law, is defined in section 30, subdivision N. Farley v. Dittman, (1913) 155 App. Div. 363, 140 N. Y. S. 321, affirmed without opinion (1914) 213 N. Y. 659, 107 N. E. 1077; People v. Hegeman, (1912) 75 Misc. 163, 135 N. Y. S. 90.

Abandonment by assignee of certificate.— An assignee of an attorney in fact of the holder of a certificate, having power to consent to a transfer thereof, may execute the notice of abandonment provided for in subdivsion 9. Matter of Farley, (1915) 170 App. Div. 400, 155 N. Y. S. 1049, affirmed (1917) 220 N Y. 103 mem. An assignee of a liquor tax certificate is authorized to serve the notice of abandonment and transfer, and apply for a new certificate at the place designated by him. Matter of Farley, (1912) 154 App. Div. 282, 138 N. Y. S. 1050, affirmed on opinion below (1913) 208 N. Y. 595, 102 N. E. 1102. And the assignment cannot be questioned or equitable or contract rights in the certificate not affecting the legal title be determined on such application Matter of Green, (1916) 171 App. Div. 583, 157 N. Y. S. 736.

Duties of certificate issuing officer.— If traffic in liquors at certain premises is prohibited by subdivision 9 of this section, it is the duty of the certificate issuing officer to refuse the application. People v. Shults, (1915) 166 App. Div. 868, 151 N. Y. S. 910, affirming 87 Misc. 348, 149 N. Y. S. 913. Thus, where an application states that a notice of abandonment of premises has

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been filed but that it is null and void, the officer must refuse to grant the application. A certificate, if issued under such circumstances, would be void ab initio. Farley v. O'Brien, (1915) 91 Misc. 89, 154 N. Y. S. 1021. But "the duties of the state commissioner of excise are purely ministerial (People ex rel. Hope v. Masterman, 209 N. Y. 182), and he has no authority or jurisdiction to pass upon the equitable or contract rights in reference to a certificate not affecting the legal title (People ex rel. Spang v. Carey, 167 App. Div. 949)." Matter of Green, (1916) 171 App. Div. 583, 157 N. Y. S. 736.

Second certificate for same premises.— There is nothing in this section which prohibits a county treasurer from issuing a second certificate for the same premises for which a prior certificate has been issued, though the number of certificates exceeds the ratio. People v. Masterman, (1913) 156 App. Div. 450, 141 N. Y. S. 1039, affirmed (1913) 209 N. Y. 182, 102 N. E. 533. The county treasurer is not justified in refusing to issue a certificate for certain premises because of the existence of a prior certificate for the same premises, which certificate was improperly obtained by one having no interest in the premises. People v. Masterman, (1912) 78 Misc. 337, 138 N. Y. S. 469, affirmed 156 App. Div. 450, 141 N. Y. S. 1039, affirmed (1913) 209 N. Y. 182, 102 N. E. 553.

Traffic at original premises.—Where, at the time a liquor tax certificate was issued in the borough of The Bronx, the ratio of population to the number of certificates issued therein under subdivision 1 of section 8 of the Liquor Tax Law was less that 750 to 1, traffic in liquors under said certificate became unlawful upon the filing later in the same month, by the holder of another certificate, of a notice of abandonment of such premises in favor of other premises, no notice of abandonment having been filed in favor of the first premises as required by subdivision 9. Matter of Green, (1916) 171 App. Div. 583, 157 N. Y. S. 736. And where traffic in liquors has been abandoned at premises within a district having a full ratio of certificates, the certificate issuing officer is expressly prohibited by subdivision 9 of this section from issuing another certificate for the same premises. People v. Carey, (1915) 167 App. Div. 949, 152 N. Y. S. 569.

Under subdivision 9 of this section, a holder of a certificate is allowed sixty days in which to apply for a transfer after he has filed a notice of abandonment, and during such period of sixty days another certificate cannot be legally issued to the abandoned premises; the wrongful issuance of such a certificate to the abandoned premises affords the certificate issuing officer no ground for refusing to issue an application for the transfer of a certificate made within sixty days. People v. Shults, (1915) 167 App. Div. 33, 152 N. Y. S. 301.

Where a notice of abandonment for premises in a borough where the ratio exceeds 750 to 1 is filed, together with a certificate of removal, the owner of the original premises cannot traffic in liquors under a new certificate for such premises, until he has filed a new notice of abandonment transferring the traffic from some other licensed premises to his own; and the fact that after the notice of abandonment was filed the license remained displayed in the original premises does not affect the validity of the abandonment. Matter of Farley, (1915) 170 App. Div. 400, 155 N. Y. S. 1049, affirmed (1917) 220 N. Y. 103 mem.

Change of location as affected by ratio generally.— In People v. Hegeman, (1916) 174 App. Div. 715, 160 N. Y. S. 531, it was held that a person having a license to sell liquor in one village is not entitled under section 25, infra, to abandon that location and have his certificate transferred to an unincorporated village in the same town, upon payment of the requisite additional tax. The court said at page 534: "While a town, through its electors, may prohibit the sale of liquor at any place within its limits, and may have all the benefits from the revenue not otherwise appropriated, the system is to make a village a distinct district (1) for the purpose of measuring the

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amount of the tax; (2) for the purpose of enumerating its inhabitants; (3) for the purpose of establishing a ratio of population to certificates, and by section 8, subdivision 9, for the transfer of certificates, whereby the first licensed premises becomes disabled for the liquor traffic and the new premises legalized irrespective of the ratio rule. Before the introduction of that rule, it was immaterial whether the traffic was in a village or elsewhere in a town, except as concerns the amount of the tax; but when it became the law that in a village there should be a certificate only for each 750 of the population, with exceptions not here pertinent, a new element was introduced, whereby the village was segregated, and provision was made for transferring certificates from one premises to another in the same village. The provision also treated of transfers in the same town, but as the village is named separately from the town for the purpose of fixing the ratio and for the purpose of transferring certificates, section 25 should be regarded as limited by the later provision. . . . Such disregard of the scheme of the Liquor Tax Law, viewed in its entirety, should not be permitted, notwithstanding the provision in section 25, which was harmonious with the statute previous to the addition of subdivision 9 to section 8, but, if given its former scope, is inconsistent with, and destructive of, a new and important element in the Liquor Tax Law."

Failure to conduct traffic at new location.— Where, in a city having a a full ratio of certificates, a notice of abandonment of traffic in liquors at one place and removal to another location is filed with the certificate issuing officer, if the holder fails to traffic at the substituted place within the sixty days period, the notice of abandonment becomes null under the statute, and a certificate may be issued for the original location. Matter of Farley, (1916) 216 N. Y. 449, 111 N. E. 66. But, where a certificate is transferred to a new location at which it is proposed to conduct a summer hotel, if the hotel is equipped and open for business within the period of sixty days, the fact that little business, if any, is actually done, does not invalidate the transfer and authorize the issuance of a certificate to the original location. People v. Hegeman, (1912) 75 Misc. 163, 135 N. Y. S. 90.

Premises on dividing line between city and town.— Where premises are located on the dividing line between a city and a town, the last license being issued for premises in the town, after the town has voted dry on the local option questions, the proprietor cannot obtain a license for premises in the city, the number of licenses issued in the city exceeding the number permitted under the Ratio Act. People v. Shults, (1915) 166 App. Div. 868, 151 N. Y. S. 910, affirming 87 Misc. 348, 149 N. Y. S. 913.

If the proprietor of a hotel situate on the dividing line between a city and a town procures a license for the premises in the town, but unlawfully traffics in the city, he is not within the exception to subdivision 9 of this section, and cannot procure a license for the premises in the city if the number of licenses issued exceeds the ratio allowed. People v. Shults, (1915) 166 App. Div. 868, 151 N. Y. S. 910, affirming 87 Misc. 348, 149 N. Y. S. 913.

Remedy in equity.— Where a certificate is wrongfully issued to a person not entitled thereto, if the continuance of its operation will under subdivision 9 deprive one of a certificate to which he is rightfully entitled, the latter may maintain an action in equity for the cancellation of the certificate wrongfully issued. In such an action the plaintiff need not make the assignee of the illegal certificate a party. McMahon v. Henckel, (1915) 91 Misc. 85, 153 N. Y. S. 915. And, if a tenant of premises files a notice of abandonment for premises, when he had in his lease waived his right to file such a notice, the landlord may maintain an action in equity to set aside the notice of abandonment. Brunner v. Diogenes Brewing Co., (1916) 93 Misc. 681, 158 N. Y. S. 607.

Storekeepers license in place under 7,500 population.— Under subdivision 10 of this section a license cannot be issued under subdivision 2 for the sale

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of liquors not to be drunk on the premises in a town of less than 7,500 population, though the electors of the town voted in favor of such sale under section 13. People v. Holmes, (1915) 90 Misc. 63, 154 N. Y. S. 163.

Cited.— In Bartholomay Brewery Co. v. O'Brien, (1916) 172 App. Div. 784, 159 N. Y. S. 126, affirmed (1917) 220 N. Y. 27 mem., subdivision 9 of this section was cited as indicating the value of an assignment of a liquor tax certificate. See infra, § 12-a note.

§ 9. Tax, when due and payable. The several amounts to be paid as taxes under this chapter are assessed, and shall be paid in advance on the fifteenth day of September of each year, and said assessments together with any penalty that may become due by reason of the violation of any of the provisions of this chapter, shall attach to and operate as a lien on the property on and in said premises where such traffic in liquors is carried on or elsewhere belonging to the corporation, association, copartnership or person from whom such tax is due; provided, however, that when such traffic shall be commenced after the said first day of October in any year, said assessment shall, for the balance of the year, be in proportion as the remainder of the year shall be to the whole year, except that it shall in no case be for less than one-twelfth of a year, any part of a month being computed as one month, and the said amount shall attach and operate as a lien as aforesaid, at the date of such commencement.

This section was derived from the Liquor Tax Law of 1896, § 12, as amended by L. 1908, ch. 144, § 2.

Section 9 of the Liquor Tax Law of 1896 is now covered by section 6.

Action for tax by commissioner.— There is no authority conferred upon the commissioner of excise to maintain an action to collect a tax under subdivision 1 of section 8, outside of a city of the first class. Lyman v. McGreivey, (1898) 25 App. Div. 68, 48 N. Y. S. 1035, affirmed (1899) 159 N. Y. 561, 54 N. E. 1093.

Action against county treasurer for excessive tax paid.— Where an applicant for a certificate has paid an excessive tax, and thereafter he surrenders the certificate and receives a rebate certificate therefor, such certificate can be enforced only according to the provisions of section 24, and the holder cannot maintain an action at law against the county treasurer to recover the excess. Ging v. Sherry, (1898) 32 App. Div. 354, 52 N. Y. S. 1003.

Cited: Farley v. Dittman, (1913) 155 App. Div. 363, 140 N. Y. S. 321, affirming without opinion (1914) 213 N. Y. 659, 107 N. E. 1077.

§ 10. Officers to whom the tax is to be paid and how distributed. The taxes assessed, and all fines and penalties incurred under this chapter in counties or boroughs having a special deputy commissioner of excise shall be collected by and paid to him. In all other counties such taxes, fines and penalties shall be collected by

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and paid to the county treasurer of the county in which the traffic is carried on, except that the taxes assessed under subdivisions four and five of section eight of this chapter, and all fines and penalties in connection therewith, shall be collected by and paid to the state commissioner of excise and by him to the state treasurer. After June thirtieth, nineteen hundred and seventeen, one-half of the revenues resulting from taxes, fines and penalties under the provisions of this chapter less the amount allowed for collecting the same, and before July first, nineteen hundred and seventeen, three-fifths of the revenues resulting from such taxes, and one-half of the revenues resulting from fines and penalties, under the provisions of this chapter less the amount allowed for collecting the same, shall be paid by the county treasurers, and by the several special deputy commissioners receiving the same within ten days from the receipt thereof, to the treasurer of the state of New York to the credit of the general fund, as a part of the general tax revenue of the state and shall be appropriated to the payment of the current general expenses of the state and the remainder thereof, less the amount allowed for collecting the same, shall belong to the town or city in which the traffic was carried on from which revenues were received, and shall be paid by the county treasurer of such county, or by the special deputy commissioner to the supervisor of such town, or to the treasurer or fiscal officer of such city, within ten days from the receipt thereof. All excise moneys collected by county treasurers and special deputy commissioners of excise shall be deposited until the same shall be paid over to the state treasurer or local fiscal officer as is herein provided, in bank or other depositories designated by the state commissioner of excise, who shall require from each such bank or depository a bond running to the people of the state of New York in such penalty and with such sureties as shall be approved by the said state commissioner, conditioned that such bank or depository will safely keep all such moneys that may be so deposited in or held by it on deposit and will promptly pay the same over at any and all times upon legal demand therefor. Action on said bond for any default or violation of its conditions may be brought by the state commissioner of excise who shall distribute the amount of money recovered to the locality and the state as their respective interests may appear. At the time of making such payment the special

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deputy commissioner or county treasurer shall furnish to the officer of such city or town to whom such payment is made a written statement under oath stating when such money was received and from whom received; and that the statement includes all the moneys received to a date named in such statement. Such revenues shall be appropriated and expended by such town or city, in such manner as is now or may hereafter be provided by law for the appropriation and expenditures of sums received for excise licenses or in such other manner as may hereafter be provided by law; and any portion of such revenues not otherwise specifically appropriated by law may be applied to the ordinary expenses of the city or town. Any special deputy commissioner or county treasurer who shall neglect or refuse to apportion and pay over such moneys, as above provided, shall, in addition to the fines and penalties otherwise provided in this chapter, be liable to a penalty of fifty dollars for each and every offense, to be recovered in an action by the officer entitled to receive such excise moneys, brought by such officer in the name of the city or town entitled thereto, with costs, in addition to the money unlawfully withheld; and if any special deputy commissioner or county treasurer shall wilfully make and verify a false statement under this section, he shall be guilty of perjury.

This section was derived from the Liquor Tax Law of 1896, § 13, as amended by L. 1897, ch. 312, § 7; L. 1900, ch. 367, § 2; L. 1903, ch. 115, § 2, and L. 1903, ch. 486, § 6. It was amended to read as above by L. 1916, ch. 416, § 5. The amendments affected the third sentence of the section. The words "After June thirtieth, nineteen hundred and seventeen" were added at the beginning of the sentence. The words "and before July first . . . collecting the same" were added before the words "three-fifths," and the word "remainder" was substituted in place of the words "remaining one-half" near the end of the sentence.

Section 10 of the Liquor Tax Law of 1896 is now covered by section 7.

Collection of liquor license tax by suit: see 12 Ann. Cas. 173 note.

Constitutionality.— Section 13 of the Liquor Tax Law of 1896, containing provisions of the same general import as this section, was held not to render the act unconstitutional because a portion of the revenues was to be distributed to the towns and cities. The provisions were held not to be an appropriation of public moneys or property within the meaning of article III, section 20, of the constitution, requiring the assent of two-third of the members elected to each branch of the legislature to every bill appropriating the public moneys or property for local or private purposes. People v. Murray, (1896) 149 N. Y. 367, 44 N. E. 146, 32 L. R. A. 344, affirming 4 App Div. 185, 38 N. Y. S. 909

Disposition of town moneys.— The portion of the excise moneys due to a town should be paid to the supervisor thereof. Op. Atty.-Gen. (1896) 170. There being no provision in the statute as to the way and manner the supervisor shall disburse the moneys coming into his hands, their disposition is

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governed by the Town Law, and the supervisor cannot pay any claims against the town with such funds until they have been audited by the town board or town auditors. Annis v. McNulty, (1906) 51 Misc. 121, 100 N. Y. S. 951.

Disposition of city moneys.— It was held, under the equivalent section of the Liquor Tax Law of 1896, and under the charter of Long Island City, that the city council of such city could transfer the liquor tax moneys so as to make good a deficiency in a city fund created by the failure of the city to collect the taxes imposed by it, but that such moneys could not be transferred to the sinking fund of the city. Hunt v. New York, (1900) 47 App. Div. 295, 62 N. Y. S. 184.

Greater New York.— After the enactment of the Greater New York Charter in 1897, it was held that the excise taxes in Richmond county were to be collected by the comptroller of New York city, and those in Queens county by the county treasurer of such county. Op. Atty.-Gen. (1897) 338. And, as to taxes collected in Queens county, it was held by the attorney-general that two-thirds thereof should be paid to the fiscal officer of New York city, and that orders for the payment of rebates should be drawn on such officer. Op. Atty.-Gen. (1898) 112.

Payment of costs in revocation proceedings.— Where costs have been awarded against a county treasurer in a proceeding for the revocation of a certificate under section 27, the court cannot direct that such costs shall be paid out of the liquor tax moneys received by such county treasurer. Matter of Seymour, (1900) 47 App. Div. 320, 62 N. Y. S. 25. See infra, § 27, as to costs in such proceedings.

Liability of surety on bond of depositary.— Where the bank in which the excise moneys have been deposited fails, the surety on the bond is liable, not only for the amount of uncertified checks which have been drawn on the bank for the distribution of the moneys, but also for unpresented certified checks which have been so drawn, though the bank upon certification of the checks transferred the fund from the account of the drawer to the account of the payee. Cullinan v. Union Surety, etc., Co., (1903) 79 App. Div. 409, 80 N. Y. S. 58.

Special act providing for different distribution.— Under the Liquor Tax Law of 1896, two-thirds of tax was distributed to the town or city where the traffic was carried on; and it was held that a special Act of 1898, providing that all excise money arising from licenses granted in a certain town shall be deposited with the treasurer of the poor fund of such town, should be construed as pertaining only to the two-thirds to be distributed to such town. People v. Williams, (1900) 162 N. Y. 240, 56 N. E. 625, reversing 47 App. Div. 88, 62 N. Y. S. 130, and affirming 29 Misc. 463, 61 N. Y. S. 983.

Cited: Matter of Simons, (1911) 145 App. Div. 471, 130 N. Y. S. 306, reversed (1912) 204 N. Y. 253, 97 N. E. 526; Op. Atty.-Gen. (1913) 532. In People v. Hegeman, (1916) 174 App. Div. 715, 160 N. Y. S. 531, this section was cited as bearing on the seeming conflict between section 25 and subdivision 9 of section 8. See supra, § 8 note, IV, *Ratio of Certificates*, and infra, § 25 note.

§ 11. Compensation of county treasurers. As full compensation and in full payment of all charges and expenses for collecting the taxes herein provided for, and keeping the necessary books and making the necessary reports, as required by the state commissioner of excise, and issuing the liquor tax certificates, the officer charged therewith, shall be allowed, except as provided in section six, in counties containing a city of the first or second class

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one per centum of the amount of taxes, penalties and fines collected; in counties containing a city of the third class, but not a city of the first or second class two per centum; in all other counties, three per centum, which amount shall be deducted and retained by him from the moneys so collected, as his compensation for the duties imposed upon him by this chapter, and in addition to the salary or fees allowed by law for the performance of his other official duties, and charged one-half to the state and one-half to the locality to which the tax belongs.

This section was derived from the Liquor Tax Law of 1896, § 14, as amended by L. 1898, ch. 167, § 2; L. 1903, ch. 486, § 7, and L. 1907, ch 345, § 4.

Section 11 of the Liquor Tax Law of 1896 is now covered by section 8, subdivision 6-a being covered by subdivision 7, and subdivision 7 being covered by subdivision 8.

Power of supervisors to fix compensation of county treasurer: see COUNTY LAW, § 12, subd. 5.

Fees in addition to salary.— It has been held that where the salary of a county treasurer was fixed before the enactment of the Liquor Tax Law, prescribing fees for services in connection with such law, the fees so prescribed were in addition to the salary. Montgomery County v. Vosburgh, (1911) 74 Misc. 562, 134 N. Y. S. 457. And see also Op. Atty.-Gen. (1898) 150. But the above decision was thought not to be controlling in a case where the salary was not fixed until after the Liquor Tax Law had gone into effect. Op. Atty.-Gen. (1912) 258.

County containing cities of different classes.— In the county of Albany, which contained a city of the second class and one of the third class, it was held by the attorney-general that the county treasurer was entitled to fees at only 1 per cent. Op. Atty.-Gen. (1896) 167.

Fees deducted from tax.— The fees allowed in this section are to be deducted from the amount of the tax. The applicant is not concerned with them; and when a refund is made the applicant is entitled to a pro rata refunding of the whole amount paid for the certificate. Op. Atty.-Gen. (1896) 177.

Cited: Matter of Townsend, (1909) 195 N. Y. 214, 88 N. E. 41, 16 Ann. Cas. 921, 22 L. R. A. (N. S.) 194; Op. Atty.-Gen. (1913) 532.

§ 12. Books and blanks to be furnished by the state commissioner of excise. The state commissioner of excise shall cause to be prepared the necessary books for his office and shall also cause to be prepared and furnished to each special deputy commissioner and to each county treasurer in counties not containing a city of the first class, the necessary and proper books of record, and books in which accounts shall be kept of all taxes, or other moneys accruing and collected under the provisions of this chapter, and the necessary blanks for reports, and the blanks necessary for the application for liquor tax certificates, and the blank bonds and liquor tax certificates provided for in this chapter, which books, blanks and certificates shall be uniform throughout

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the state. Such books of record and account and all reports, applications and bonds when filed, shall be public records. The necessary expenses of preparing such books and blanks and certificates shall be paid out of the treasury of the state from any funds not otherwise appropriated. He shall furnish to each county treasurer in counties not containing a city of the first class, and to each special deputy commissioner, who shall keep the same, a record book showing the following facts:

1. The name of each corporation, association, copartnership or person upon which or whom a tax is assessed under the provisions of this chapter.

2. The name of each corporation, association, copartnership or person, paying a tax under the provisions of this chapter.

3. The name of each corporation, association, copartnership or person to which, or to whom, a certificate of the payment of such tax is issued.

4. Under which of the subdivisions of section eight of this chapter such certificate of the payment of such tax is issued.

5. The date when such tax is assessed and the date of the commencement of the term for which issued.

6. The term for which such certificate is issued and the date of the ending thereof.

7. The amount of the tax assessed.

8. The amount of tax paid.

9. The date when paid.

10. The location of the premises where the traffic is carried on.

11. The name and residence of each surety or corporation on the bond of the corporation, association, copartnership or person to whom the tax certificate is issued.

12. The amount of each fine or penalty and the costs if any.

13. The amount collected.

14. The amount of the expenses of such collection.

15. The date of the surrender or cancellation of any tax certificate and the cause therefor.

16. The amount of tax refunded, if any, upon such surrender or cancellation.

17. Said special deputy commissioner or county treasurer must keep a separate and distinct account of all excise moneys received and paid over by him; and such moneys must be deposited without delay in a bank or other depository, and kept in a separate account,

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in the official name of such officer, entitled "liquor tax moneys." Such officer shall also keep all such books of account and in such form as the state commissioner of excise shall provide and direct, and shall render to such commissioner such reports and exhibit such records, accounts and vouchers as he may from time to time require, which reports shall be verified if the state commissioner shall so direct. The wilful making of a false statement under oath in any such report shall be perjury, and in addition thereto shall subject the person guilty to the penalty and punishment prescribed in section forty-one of this chapter. All interest accruing on undivided excise moneys deposited by any county treasurer or special deputy commissioner of excise, and all interest accruing on the part thereof apportioned to the state shall belong to the state of New York, and shall be remitted by such county treasurer or special deputy commissioner to the state treasurer. All interest moneys accruing on the part thereof belonging to the localities, until the same shall be actually withdrawn from the bank of deposit, upon the check of the county treasurer or special deputy commissioner, by the fiscal officer of the locality entitled thereto, shall belong to the county or city represented by such treasurer or special deputy commissioner, and shall be placed to the credit of the general fund thereof as often as once in each three months.

This section was derived from the Liquor Tax Law of 1896, § 15, as amended by L. 1897, ch. 312, § 8, and L. 1903, ch. 486, § 8. It was amended to read as above by L. 1909, chs. 240, § 54, and 281, § 4. These amendments are identical and affect subdivision 17. They substituted "forty-one" in place of "forty" at the end of the third sentence.

Section 12 of the Liquor Tax Law of 1896 is now covered by section 9.

§ 12-a. Assignments or transfers of certificates as collateral security to be filed in office of certificate issuing officer. Each county treasurer of a county or each special deputy commissioner of excise, if there be one, shall receive and file in his office every instrument in writing, tendered to him, by which an unexpired liquor tax certificate, issued by him or by his predecessor in office, or any other liquor tax certificate hereafter issued by him or his successor in office, is assigned or transferred by the holder thereof to a person as collateral security for moneys loaned or any other obligation incurred; and such county treasurer or special deputy, as the case may be, shall immediately enter in a record book to be

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kept by him for that purpose the name of the certificate holder, the location of the premises for which such certificate was issued, or to which such certificate may have been transferred, under what subdivision of section eight the certificate was issued, the date when issued, the name and the address of the assignee or transferee, the date of such assignment or transfer, the date such assignment or transfer was received and filed and the date of the cancellation and discharge of the same; such county treasurer or special deputy, as the case may be, shall immediately indorse upon said assignment or transfer the date of the receipt of same, the name of the holder of the certificate, the name of the assignee or transferee, the number of the certificate, the location of the premises for which the certificate was issued, or to which such certificate may have been transferred, the date of the issuance of the same, under what subdivision of section eight the certificate was issued and the date of the assignment or transfer; said indorsement shall be signed by said county treasurer, or special deputy, in whose office the same is filed and such indorsement shall be received in evidence in all courts of this state and shall be competent and sufficient prima facie evidence of all the facts stated therein.

New. Added by L. 1912, ch. 263.

Certificates as property: see infra, § 18.

Transfer of certificates: see infra, § 26.

Right to assign or transfer liquor license: see Ann. Cas. 1913A 461 note.

Validity of mortgage as against creditors.— Before the enactment of this section, it was held that a liquor tax certificate was not a chattel within the provisions of the Lien Law relating to the filing of chattel mortgages, and that an assignment thereof as security for an obligation was valid as against the creditors of the assignor, though the instrument was not filed as a chattel mortgage. Niles v. Mathusa, (1900) 162 N. Y. 546, 57 N. E. 184, affirming 20 App. Div. 483, 47 N. Y. S. 38; D. M. Koehler, etc., Co. v. Flebbe, (1897) 21 App. Div. 210, 47 N. Y. S. 369; People v. Durante, (1897) 19 App. Div. 292, 45 N. Y. S. 1073; Matter of Jenney, (1897) 19 Misc. 244, 44 N. Y. S. 84, affirmed 19 App. Div. 627, 46 N. Y. S. 1094.

Mortgage on certificate to be issued.— A chattel mortgage on a certificate to be subsequently issued gives the mortgagee no rights at law to such certificate; but the mortgage is good in equity as a contract to assign the certificate when it is acquired. McNeeley v. Welz, (1901) 166 N. Y. 124, 59 N. E 697, affirming (1897) 20 App. Div. 566, 47 N. Y. S. 310. And see to the same effect Anchor Brewing Co. v. Burns, (1898) 32 App. Div. 272, 52 N. Y. S. 1005.

Liability of county treasurer for conversion.— Where a certificate is surrendered to a county treasurer by the receiver in supplementary proceedings of the person to whom it was issued, and the county treasurer receives the same and transmits it to the commissioner of excise, without knowledge that an assignment thereof had been made before the appointment of the receiver, the county treasurer is not liable to the assignee as for a conversion. Albany Brewing Co. v. Barckley, (1899) 42 App. Div. 335, 59 N. Y. S. 65.

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Assignment to secure brewing company's control of certificate.— An assignment of a liquor tax certificate made by the licensee to a brewery, with a power of attorney back, is valid. Bartholomay Brewery Co. v. O'Brien, (1916) 172 App. Div. 784, 159 N. Y. S. 126, affirmed (1917) 220 N. Y. 27, 115 N. E. 1033. Of such assignments, Lambert, J., said at page 789: "The rights of the plaintiff in connection with such certificate are controlled by an assignment thereof, coupled with a power of attorney such as have become quite common since the enactment of the so-called 'Ratio Law.' (Liquor Tax Law [Consol. Laws, chap. 34; Laws of 1909, chap. 39], § 8, subd. 9, added by Laws of 1910, chap. 494, as amd. by Laws of 1911, chap. 298.) This manner of maintaining the brewing companies' control and dominion over numerous liquor tax certificates has frequently been attacked, but the courts have reluctantly felt compelled to sustain the validity of such transactions. (Ide v. Seibert, 151 App. Div. 900; Zobrest v. East Buffalo Brewing Co., id. 895; Chilcott v. Broadway Brewing & Malting Co., 149 id. 931.)"

Sufficiency of instrument for transfer of certificate.— In People v. Carey, (1915) 167 App. Div. 949, 152 N. Y. S. 569, an agreement relative to a certificate was held insufficient as an assigment of a certificate under this section, the certificate not having been issued at the time of the agreement.

Collateral attack on assignment.— In a proceeding by the commissioner of excise to revoke a certificate which has wrongfully been issued for premises for which a certificate of abandonment has been filed pursuant to the provisions of subdivision 9 of section 8 by an attorney in fact of the original holder of a certificate for such premises, the holder of the certificate sought to be revoked cannot attack the validity of the assignment of the original certificate as security or the right of the attorney in fact to file the notice of abandonment. Matter of Green, (DiIorio Certificate) (1916) 171 App. Div. 583, 157 N. Y. S. 736.

Contempt in attempting to defeat lien.— Where after the trial of a suit to foreclose a lien on a liquor tax certificate and after the court had announced the decision it intended to render, the attorney of the defendants advised his client to sublet the premises for which the certificate had been issued and induced the new lessee to apply for a new certificate for the purpose of preventing the plaintiff from reaping any substantial benefit from the decree, the attorney was properly adjudged guilty of a contempt of court under the authority of section 753 of the Judiciary Law; such act being contemptuous although the decree establishing the lien and directing foreclosure had not been formally entered. Bartholomay Brewery Co. v. O'Brien, (1916) 172 App. Div. 784, 159 N. Y. S. 126, affirmed (1917) 220 N. Y. 27, 115 N. E. 1033.

Sale of certificate.— Section 26 applies to the sale of a liquor tax certificate, and its provisions do not cover the transfer as collateral security. Bachman-Bechtel Brewing Co. v. Gehl, (1913) 154 App. Div. 849, 139 N. Y. S. 807.

§ 13. Local option to determine whether liquor shall be sold under the provisions of this chapter. In order to ascertain the will of the qualified electors of each town, the following questions shall be submitted at each biennial town meeting hereafter held in any town in this state, provided the electors of the town to the number of ten per centum of the votes cast at the next preceding general election shall request such submission by written petition, signed and acknowledged by such electors before a notary public or other officer authorized to take acknowledgments or

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administer oaths, which petition shall be filed not less than twenty days before such town meeting with the town clerk of the town:

Question 1. Selling liquor to be drunk on the premises where sold. Shall any person be authorized to traffic in liquors under the provisions of subdivision one of section eight of the liquor tax law, namely, by selling liquor to be drunk on the premises where sold, in (here insert the name of the town)?

Question 2. Selling liquor not to be drunk on the premises where sold. Shall any person be authorized to traffic in liqours under the provisions of subdivision two of section eight of the liquor tax law, namely, by selling liquor not to be drunk on the premises where sold, in (here insert the name of the town)?

Question 3. Selling liquor as a pharmacist on a physician's prescription. Shall any person be authorized to traffic in liquors under the provisions of subdivision three of section eight of the liquor tax law, namely, by selling liquor as a pharmacist on a physician's prescription, in (here insert the name of the town)?

Question 4. Selling liquor by hotel keepers only. Shall any person be authorized to traffic in liquors under subdivision one of section eight of the liquor tax law, but only in connection with the business of keeping a hotel, in (here insert the name of the town), if the majority of the votes cast on the first question submitted are in the negative?

The town clerk shall, within five days from the filing of such petition in his office, prepare and file in the office of the county clerk of the county a certified copy of such petition, provided the town meeting at which such questions are to be submitted is to be held at the time of the general election. The town clerk shall also, at least ten days before the holding of such town meeting or general election, cause to be printed and posted in at least four public places in such town, a notice of the fact that all of the local option questions provided for herein will be voted on at such town meeting or general election; and the said notice shall also be published, at least five days before the vote is to be taken, once, in one newspaper published in the county in which such town is situate, which shall be a newspaper published in the town, if there be one. Whenever such questions are to be submitted under the provisions of this chapter, it shall be the duty of each officer charged by law with the duty of preparing the official ballots for such town meeting or election, to have prepared at the time fixed

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by law for preparing the official ballots for such town meeting or election, the ballots required by the election law for voting upon any constitutional amendment, proposition or question in the form and of the number required by the election law, upon the face of which shall be printed in full the said questions, as heretofore stated. Any elector qualified to vote for town, county or state officers at such town meeting or general election shall be entitled to vote upon such local option questions. As soon as the town meeting or election shall be held, a return of the votes cast and counted shall be made as provided by law, and if the majority of the votes shall be in the negative or if the number of votes cast for and against shall be equal on either of such questions, no person shall thereafter so traffic in liquors or apply for or receive a liquor tax certificate under the subdivision or subdivisions of section eight, referred to in the question or questions upon which the number of votes cast for and against shall be equal or upon which the majority of the votes cast shall have been cast in the negative, except as provided by clause "j" of section thirty of this chapter. If the majority of the votes cast on the second question submitted shall be in the affirmative, the holder of a liquor tax certificate under subdivision two of section eight, who is a pharmacist, shall not sell as a pharmacist unless the majority of the votes cast on the third question submitted is in the affirmative. The status existing at the time such vote is taken upon questions submitted shall not be changed until the first day of October following next thereafter, prior to which time such vote shall neither authorize the issuance of liquor tax certificates in accordance therewith or preclude the issuance of such certificates in accordance with the result of the preceding vote on such questions submitted, nor shorten the term for which any liquor tax certificate may have been lawfully issued, nor affect the rights of any person thereunder. If for any reason except the failure to file any petition therefor, the four propositions provided to be submitted herein to the electors of a town shall not have been properly submitted at such biennial town meeting, such propositions shall be submitted at a special town meeting duly called. But a special town meeting shall only be called upon filing with the town clerk the petition aforesaid and an order of the supreme or county court, or a justice or judge thereof, respectively, which may be granted upon eight days' notice to the state commissioner

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of excise, sufficient reason being shown therefor. Upon any application for such order, the town board, or any taxpayer in the town, may intervene as a party and be heard in opposition thereto. The town clerk shall within five days after the filing of such petition and order, call a special town meeting to be held at a time not less than twenty days nor more than thirty days after the filing of such petition and order, and he shall also cause to be printed, posted and published a notice of such special town meeting, containing a clear and concise statement of the purpose thereof, and shall prepare ballots therefor in all respects as is provided by this chapter in the case of a biennial town meeting, and the result of the vote thereat shall be canvassed, certified and returned in like manner and shall take effect at the beginning of the next excise year, that is, on the first day of October following such vote, as is provided when a vote is taken at a biennial town meeting. A certified copy of a statement of the result of the vote, upon each of such questions submitted, shall immediately after the submission thereof, be filed by the town clerk or other officer with whom returns of town meetings are required to be filed by the election law with the state commissioner of excise and also with the county treasurer of the county, or with the special deputy commissioner having authority, where traffic in liquor therein is lawful, to issue liquor tax certificates to be held in such town, and no liquor tax certificate shall thereafter be issued by such officer to any person to traffic in liquor in said town under such subdivision of section eight of this chapter upon which a majority of the votes may have been cast in the negative.

This section was derived from the Liquor Tax Law of 1896, § 16, as amended by L. 1897, ch. 312, § 9; L. 1899, ch. 398, § 1; L. 1900, ch. 367, § 3; L. 1901, ch. 640, § 3; L. 1905, ch. 680, § 1; L. 1907, ch. 345, § 5, and L. 1908, ch. 144, § 3. It was amended to read as above by L. 1910, ch. 485, § 4. The amendment struck out words "except as otherwise provided in this chapter" which formerly were at the end of the section.

Section 13 of the Liquor Tax Law of 1896 is now covered by section 10.

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I. Generally

Constitutionality of local option laws: see 14 Ann. Cas. 1001 note; 1 Ann Cas. 378 note. *Local option laws as unconstitutional delegation of legislative power:* see 1 L. R. A. (N. S.) 483 note. *Validity of local option laws and submissions to popular vote:* see 15 L. R. A. (N. S.) 942 note. *Effect of partial invalidity of prohibition liquor law:* see Ann. Cas. 1916D 63 note.

Territory affected by adoption of local option law: see 21 Ann. Cas. 1015 note. *Change in local option law as affecting locality which has adopted local option:* see 21 Ann. Cas. 663 note.

Local option law as affecting existing power to regulate liquor traffic under charter of municipality located within local option district: see 32 L. R. A. (N. S.) 534 note.

Prosecution under general liquor law for sale in local option territory: see 3 L. R. A. (N. S.) 620 note. *Must indictment or information for sale of intoxicating liquors in local option district state name of purchaser:* see 23 L. R. A. (N. S.) 582 note. *Necessity that indictment for violation of local option law should allege adoption, etc., of law:* 10 Ann. Cas. 1012 note. *Burden of proof of adoption of local option law in prosecution for illegal sale of liquor:* see Ann. Cas. 1913C 627 note. *Judicial notice of local option elections:* see the following notes: Ann. Cas. 1915C 333; 18 Ann. Cas. 191; L. R. A. 1915B 788.

Signing petition for local option election as disqualifying judge or other official from action thereon: see Ann. Cas. 1912C 1092 note.

Power of legislature.—"The whole question of excise legislation is within the power of the legislature. They may grant or withhold local option to localities, and having granted it they may prescribe the conditions on which the vote thereon may become effective." People v. Ely, (1900) 2 Liq. Tax Law Rep. 398.

Object and purpose.—The object and purpose of the local option section is "the right of the electors of the town to determine whether liquor should be sold within its boundaries." Matter of Bath, (1916) 93 Misc. 575, 157 N. Y. S. 205.

Necessity of election where certificates have not been issued.—In a town where licenses were not in force when the Liquor Tax Law of 1896 went into effect, certificates cannot be issued without a favorable vote on the local option propositions. People v. Sackett, (1896) 17 Misc. 405, 40 N. Y. S. 414. And see to the same effect Matter of Wilbur, (1896) 1 Liq. Tax Law Rep. 53.

Inmates of soldiers home as voters.—The inmates of the Soldiers' Home at Bath have no right to vote on the local option questions. Matter of Smith, (1904) 44 Misc. 384, 89 N. Y. S. 1006.

Indictment.—It has been held that an indictment for selling liquors in a town which has voted "dry" on the local option propositions, should allege that a vote was taken after a petition was duly presented and due notice was given to the electors of the vote to be taken. People v. Seeley, (1905) 105 App. Div. 149, 93 N. Y. S. 982, affirmed (1905) 183 N. Y. 544, 76 N. E. 1102. On a prosecution of a hotel keeper, who received a license by virtue of a

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favorable vote on proposition 4 of the local option propositions, proposition 2 resulting in a negative vote, for a sale of liquor not to be drunk on the premises, the indictment is not defective in stating that the four questions were "duly submitted" instead of expressly alleging the various preliminary steps requisite to the legal submission of such questions. "The words 'duly submitted' imply the existence of every fact essential to the regularity of the proceedings. People v. Yarter, (1912) 152 App. Div. 566, 137 N. Y. S. 462.

Cited.— In People v. Hegeman, (1916) 174 App. Div. 715, 160 N. Y. S. 531, this section was cited as bearing on the seeming conflict between section 25 and subdivision 9 of section 8. See supra, § 8 note, IV, Ratio of Certificates, and infra, § 25 note.

II. Petition

Acknowledgment or proof generally: see General Construction Law, §§ 10, 11. *Before whom acknowledgments may be taken:* see Code Civ. Pro., § 842. *Criminal liability for false certificate to certain instruments:* see Penal Law, § 885.

Necessity of petition.— The filing of a petition signed and acknowledged by the requisite number of electors is a condition precedent to a valid election. Kennedy v. Warner, (1905) 3 Liq. Tax Law Rep. 513. The filing of the petition is indispensable to a submission of the four questions specified in this section. Matter of Krieger, (1901) 59 App. Div. 346, 69 N. Y. S. 851. If the petition is not signed by a sufficient number of electors, the questions cannot be submitted. Op. Atty.-Gen. (1905) 539.

Requesting submission of only part of questions.— This section contemplates that the petition shall request the submission of all four of the local option propositions; if it fails to request the submission of all, none can be submitted to the voters. Kennedy v. Warner, (1906) 51 Misc. 362, 100 N. Y. S. 616; Matter of Getman, (1899) 28 Misc. 451, 59 N. Y. S. 1013.

Statement of propositions.— It is not required that the petition set forth in full the propositions to be voted on at the election; a petition is sufficient which requests the submission at the next biennial town meeting of the several questions in relation to the sale of liquors in the town as provided by the Liquor Tax Law. Matter of Rice, (1904) 95 App. Div. 28, 88 N. Y. S. 512. Though the petition does not set forth the questions to be submitted in the language of the statute, if it recites and asks that the questions of selling liquors in pursuance of the several subdivisions of the Liquor Tax Law be legally and properly submitted, and that proper ballots be furnished in accordance with the said law and the amendments thereto, and recites the several questions to be submitted as hereinbefore set forth, it is sufficient to apprise the town clerk of the questions to be prepared and submitted to the electors. Matter of Quick, (1905) 3 Liq. Tax Law Rep. 540.

Necessity of required number of signatures.— If a petition is not signed by a sufficient number of electors, the questions cannot be submitted to the electors. Op. Atty.-Gen. (1905) 539.

Burden of showing lack of signatures to petition.— A petition is not insufficient because it does not show on its face that the signatures thereto constitute 10 per centum of the votes cast at the preceding general election; but the burden is on the party attacking the petition to show, as a matter of fact, that the petition does not contain the requisite number of signatures. Matter of Rice, (1904) 95 App. Div. 28, 88 N. Y. S. 512. In the absence of anything further on the question, the presumption exists, in view of the fact that the town clerk submitted the questions to the electorate, that the number of signers whose names are contained in the petition is sufficient to require the clerk to act, and this presumption continues until the answering parties overcome the same by competent proof. Matter of Quick, (1905) 3 Liq. Tax Rep. 540.

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Names on two papers.— If the required number of electors file a petition for the submission of the local option propositions, and their signatures are properly acknowledged, it is not material that their names are signed to two or more different papers. Matter of Cipperley, (1905) 50 Misc. 266, 100 N. Y. S. 473.

Effect of surplus names not properly signed or acknowledged.— If there is a sufficient number of electors who have signed and duly acknowledged the petition, it is not rendered invalid by the signatures of others who are not qualified or by defective acknowledgments of other signers. Op. Atty.-Gen. (1905) 541.

Necessity of acknowledgment.— The acknowledgment to the petition is as essential as its filing, for, without a petition duly signed and acknowledged, the town officers have no power to submit the questions to the electors. Kennedy v. Warner, (1906) 51 Misc. 362, 100 N. Y. S. 616.

Purpose of requirement of acknowledgment.—"It has been held that the Legislature intended to require a certificate of acknowledgment in the form necessary to prove the conveyance of real property, in order that there might be some proof of the genuineness of the signatures. Kennedy v. Warner, unreported opinion of Sewell, J." Matter of Cipperley, (1905) 50 Misc. 266, 100 N. Y. S. 473.

Form of certificate of acknowledgment.— This section does not in express terms require that the petition shall be acknowledged and certified in the manner prescribed by law for the taking and certifying of acknowledgments for the conveyance of real property, but such a requirement need not be stated in express words, for section 11 of the General Construction Law provides a general rule for acknowledgments of papers filed in public offices. Kennedy v. Warner, (1905) 3 Liq. Tax Law Rep. 513.

A certificate of acknowledgment is not defective because it states that the signers of the petition acknowledged the "execution" of the petition instead of acknowledged the "signing" of the petition. Matter of Livingston, (1909) 62 Misc. 334, 115 N. Y. S. 269.

The certificate of acknowledgment is defective, where it is dated on the day the election is to be had or if the day is blank. Op. Atty.-Gen. (1909) 880. And an acknowledgment is insufficient where the certificates merely states that on a certain date the above named persons appeared before the officer and signed the above petition in his presence, without any statement therein that they were known to the officer or that they acknowledged the signing. Jackson v. Seeber, (1906) 50 Misc. 479, 100 N. Y. S. 563.

Time for filing petition.— Before the statute expressly stated that a petition for a submission of the local option propositions should be filed twenty days before the election, it was held that under the Town Law the town clerk was not required to submit the propositions if the petition was not filed at least twenty days prior to the election. People v. Town Clerk, (1899) 26 Misc. 220, 56 N. Y. S. 64. Under the Town Law in 1898, the petition was required to be filed at least twenty days before election. Op. Atty.-Gen. (1898) 170.

Filing petition in county clerk's office.— The filing of a petition in the office of the county clerk instead of in the office of the town clerk, is a nullity; but a resubmission of the propositions cannot be ordered on such ground, for the only authority for a resubmission is in this section, and the case is within the exception to the authority to order a special town meeting. Matter of Krieger, (1901) 59 App. Div. 346, 69 N. Y. S. 851.

Removal and alteration of petition.— The removal of the petition from the town clerk's office after its filing and the interlineation therein of certain words, does not affect the validity of the election so as to defeat an application for a resubmission on the ground that the ballots were defective. Matter of Quick, (1905) 3 Liq. Tax Law Rep. 540.

Filing certified copy of petition with county clerk.— The reason for the filing of the certified copy of the petition with the county clerk is that the

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county clerk may provide the ballots, and the reason fails when he is not required to furnish the ballots. Matter of Rice, (1904) 95 App. Div. 28, 88 N. Y. S. 512. Thus, the requirement applies only when the local option propositions are to be submitted at the time of a general election. Matter of Rice, (1904) 95 App. Div. 28, 88 N. Y. S. 512.

A resubmission of the local option questions will not be ordered for a failure to file a certified copy of the petition with the county clerk, if the election is not held at the time of the general election. Matter of Quick, (1905) 3 Liq. Tax Law Rep. 540. The filing by the town clerk of the copy more than twenty days before election, but seven days after its receipt, is a substantial compliance with the statute, and a resubmission will not be ordered on that ground. Matter of Rice, (1904) 95 App. Div. 28, 88 N. Y. S. 512.

III. Submission of Questions

1. When and by Whom Submitted

State commissioner to be made party to all actions and proceedings affecting submission of local option questions: see supra, § 3.

Town meetings generally: see Town Law, § 40 et seq.

Special town meeting.— An original submission of the local option propositions can be had only at the annual town meeting; it is only the resubmission had by order of the court that is held at a special town meeting. People v. Sackett, (1897) 15 App. Div. 290, 44 N. Y. S. 593, 40 N. Y. S. 414, reversing 17 Misc. 466; Op. Atty.-Gen. (1896) 137; Op. Atty.-Gen. (1898) 205.

If an original submission is held at a special town meeting, the certificate issuing officer is justified in refusing to issue certificates for the town, though the result of the vote is in favor of the issuance of certificates. People v. Sackett, (1897) 15 App. Div. 290, 44 N. Y. S. 593, reversing (1896) 17 Misc. 406, 40 N. Y. S. 414.

Changing town meeting from November to March.— Under section 40 of the Town Law, the board of supervisors of a county where town meetings have been held at the time of the general election in November in odd numbered years, may pass a resolution changing the time of town meetings to the first Tuesday after the first Monday in March of the even numbered years. Smith v. Farley, (1913) 155 App. Div. 813, 140 N. Y. S. 990.

Submissions to be submitted biennially.— The statute provides for the submission of the propositions biennially. If submitted in 1896, they could be again submitted in 1898, but not in 1899. Op. Atty.-Gen. (1898) 155. When the questions were not voted upon at the town election held next after the passage of the Liquor Tax Law of 1896, they could not be voted upon at the next town election, but only biennially thereafter. Op. Atty.-Gen. (1897) 90.

Election at town meeting not held on election day.— A vote upon the local option propositions had at a town meeting not at the time of general election is governed by the provisions of the Town Law, not the Election Law. People v. Pierson, (1901) 35 Misc. 406, 71 N. Y. S. 993, affirmed 64 App. Div. 624, 72 N. Y. S. 1123. But where local option questions are submitted to the electors at a town meeting held in connection with a general election, the commissioners of election provided for by sections 190 and 341 of the Election Law should take charge of the submission of such questions, and a motion for a resubmission thereof at a special town meeting on the ground that they should have been submitted under the direction of the town clerk will be denied. Matter of Wayland Electors, (1916) 94 Misc. 417, 157 N. Y. S. 889, affirmed 173 App Div. 1001; Matter of Bath, (1916) 93 Misc. 575, 157 N. Y. S. 205. In Onondaga county, the duty of posting and publishing the preliminary notices has been taken from the town clerks and imposed on the

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board of elections. Matter of Onondaga, (1914) 163 App. Div. 191, 148 N. Y. S. 36, affirmed on opinion below (1914) 212 N. Y 577, 106 N. E. 1043.

Duties of town clerk.— The provisions of this section requiring the town clerk to submit the questions are mandatory. Matter of Smith, (1904) 44 Misc. 384, 89 N. Y. S. 1006. The town clerk is a mere ministerial officer, with duties outlined by statute. He has no authority to waive the provisions of the statute under which he is acting. Op Atty.-Gen. (1909) 880.

2. Notices of Election

Mandatory nature of provisions.— The provisions of this section relative to the posting and publishing of notices of the election are mandatory, and failure to comply substantially with the requirements authorizes an order for the resubmission of the questions. Matter of Livingston, (1907) 189 N. Y. 549, 82 N. E. 1133, affirming 120 App. Div. 899, 105 N. Y. S. 1145; Matter of Moore, (1914) 161 App. Div. 953, 146 N. Y. S. 1101; Matter of O'Hara, (1901) 68 App. Div. 512, 71 N. Y. S. 613; Matter of Smith, (1904) 44 Misc. 384, 89 N. Y. S. 1006; Matter of Sullivan, (1901) 34 Misc. 598, 70 N. Y. S. 374; Matter of Pitkin, (1901) 2 Liq. Tax Law Rep. 539. "The provision of the statute that, at least ten days before the holding of the town meeting the town clerk shall cause the notices to be printed and posted, is peremptory, an absolute requirement necessary to give jurisdiction to take the vote prescribed by statute." Matter of Powers, (1901) 34 Misc. 636, 70 N. Y. S. 590. But see Matter of Woolston, (1901) 35 Misc. 735, 72 N. Y. S. 406; Matter of Rowley, (1901) 34 Misc. 662, 70 N. Y. S. 208, holding, in effect, that the requirements are merely directory.

General knowledge of voters as a substitute.— Where the notices of the election are not posted and published as required in this section, a resubmission will be ordered, though the electors of the town had general knowledge of the vote and a full vote was polled. Matter of Moore, (1914) 161 App. Div. 953, 146 N. Y. S. 1101; Matter of Sullivan, (1901) 34 Misc. 598, 70 N. Y. S. 374. Compare Matter of O'Hara, (1903) 40 Misc. 355, 82 N. Y. S. 293, wherein it was held that where there is no newspaper published in the town, a resubmission will not be ordered because of the failure of the town clerk to publish the notice in a county paper, where the electors received actual notice of the election and the public has not suffered from the failure to print the notice. And see, to the same effect: Matter of France, (1902) 36 Misc. 693, 74 N. Y. S. 379; Matter of Rowley, (1901) 34 Misc. 662, 70 N. Y. S. 208.

Publication without posting.— The failure of the town clerk to post the proper notice of the election, requires a resubmission of the propositions, though a notice has been duly published in the newspaper. Matter of Powers, (1901) 34 Misc. 636, 70 N. Y. S. 590.

Insufficient publication.— A resubmission of the local option questions will be ordered where the notice of a meeting to be held on Tuesday was not published until the preceding Saturday, for the requirement of a five days' prior publication is mandatory; and this is true though the ballots show a general expression by the town electors. Matter of Moore, (1914) 161 App. Div. 953, 146 N. Y. S. 1101.

Newspaper printed in another village.— A newspaper intended for a certain town and to be uttered and distributed in the first instance in such town, and entered as second class matter in such town and mailed in the post-office of such town, is published therein, though it is printed in another place. Matter of Gainsway, (1910) 66 Misc. 521, 123 N. Y. S. 966.

Sufficiency of posting.— A resubmission of the local option questions will be ordered where the notices of the election were posted only eight days, instead of the ten required by the statute. Matter of Canaan, (1913) 80

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Misc. 547, 142 N. Y. S. 669. But, before the requirement of a ten days' posting was made a part of the statute, it was held that a notice of four days would not require a resubmission of the propositions. People v. Chandler, (1899) 41 App. Div. 178, 58 N. Y. S. 794. The statute does not require that one of the notices of election shall be posted on the official signboard of the town clerk. Matter of Smith, (1904) 44 Misc. 384, 89 N. Y. S. 1006.

Contents of notices.— The statement in the posted and published notices that the proposition "will be submitted" instead of "will be voted on" is not such a departure from the statute as will warrant the court in directing a resubmission. Matter of Jones, (1909) 65 Misc. 220, 121 N. Y. S. 386. Where the notice as published and posted does not state that the questions will be voted on, but merely contains a copy of the questions, a resubmission will be ordered. Matter of Foster, (1908) 57 Misc. 676, 108 N. Y. S. 788.

Failure to repeat language of caption.— A resubmission will not be ordered because the notices of the election do not repeat the language of the caption, if they are otherwise in the language of the statute. People v. Edwards, (1904) 42 Misc. 567, 87 N. Y. S. 618.

Failure to state propositions in detail.— The fact that the posted notices of election do not state the questions to be voted upon, but merely state that all the questions provided for in this section of the Liquor Tax Law will be voted upon, is not such an irregularity as will justify the court in granting an injunction to restrain the holding of the election. Matter of Livingston, (1909) 62 Misc. 334, 115 N. Y. S. 269. The posting and publication of notices is sufficient if it gives general notice of an election on the local option propositions, though it does not state the questions in full. Matter of Woolston, (1901) 35 Misc. 735, 72 N. Y. S. 406; Matter of Quick, (1905) 3 Liq. Tax Law Rep. 540.

3. *Ballots*

Form of ballots for questions submitted: see ELECTION LAW, § 332. *Number of official ballots:* see ELECTION LAW, § 340.

Duty of furnishing ballots.— When the Liquor Tax Law of 1896 was first enacted, there was some confusion as to who should furnish the ballots and with whom the petition should be filed, but it was held that the petition for the election should be filed with the town clerk, and that such officer should furnish the ballots. Matter of Eggleston, (1900) 51 App. Div. 38, 64 N. Y. S. 471. And see Op. Atty.-Gen. (1905) 529; Op. Atty.-Gen. (1903) 451.

Hypothesis left off fourth proposition.— The last words of proposition four, "if the majority of the votes cast on the first question submitted are in the negative," are material; and if left from the ballot a resubmission of all four of the local option questions is required. People v. Mosso, (1899) 30 Misc. 164, 63 N. Y. S. 588; Matter of Munson, (1904) 95 App. Div. 23, 88 N. Y. S. 509. See also Matter of Arnold, (1900) 32 Misc. 439, 66 N. Y. S. 557; Matter of Quick, (1905) 3 Liq. Tax Law Rep. 540.

Caption.— The failure of the ballots to contain the caption used in the statute is not such an irregularity as requires a resubmission. People v. Edwards, (1904) 42 Misc. 567, 87 N. Y. S. 618. See also Matter of Merow, (1906) 112 App. Div. 562, 99 N. Y. S. 9. The mere fact that the word "only" is omitted from the caption of the fourth proposition, is not sufficient to warrant a resubmission of the questions. Matter of Rice, (1904) 95 App. Div. 28, 88 N. Y. S. 512; Matter of Quick, (1905) 3 Liq. Tax Law Rep. 540.

Reference to wrong section of statute.— A resubmission of the local option questions will not be ordered because the ballots used in the voting machines refer to the wrong section of the Liquor Tax Law. Matter of Jones, (1909) 65 Misc. 220, 121 N. Y. S. 386.

Other propositions on same ballot.— The fact that local option ballots also include four propositions for constitutional amendments which are numbered

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from one to four, and the local option propositions are numbered from 5 to 8, is not sufficient ground for a special election on the liquor questions. Matter of Arnold, (1900) 32 Misc. 439, 66 N. Y. S. 557. The local option propositions should be printed on a ballot separate from that containing the candidates for office. Op. Atty.-Gen. (1897) 92. Other town propositions, except such as relate to the raising or appropriation of money for town purposes, may be printed on the same ballot. Op. Atty.-Gen. (1901) 246. Moreover, the attorney-general has expressed the opinion that an election is valid as to the local option propositions, though the ballot contains a fifth proposition which the law requires to be placed on a separate ballot. Op. Atty.-Gen. (1903) 271. But the courts have held that the submission of a highway proposition as No. 5 on the local option ballots in connection with other irregularities in the election, was ground for a resubmission. Matter of Smith, (1904) 44 Misc. 384, 89 N. Y. S. 1006.

Insufficient statement of questions.— A resubmission of the local option questions will be ordered, where the questions are submitted in the following form: Question No. 1. Selling liquor to be drunk on the premises where sold, known as a saloon license. Question No. 2. Selling liquor not to be drunk on the premises where sold, known as a store license. Question No. 3. Selling liquor as a pharmacist on a physician's prescription. Question No. 4. Selling liquor by hotel keepers only. Matter of Gibson, (1908) 108 N. Y. S. 485.

Indorsement on back.— The ballots should be consecutively numbered on the back thereof and should be indorsed "questions submitted," with the signature of the clerk whose duty it is to prepare the ballot. Op. Atty.-Gen. (1897) 102.

Numbered ballots.— The fact that the ballots have a number printed on them and on the stubs from which they are detached, so that one by comparing the number of the ballots with the record of the votes, could acquire a knowledge of the manner in which each voter answered the questions, will not warrant a resubmission of the local option propositions. Matter of Groton, (1909) 63 Misc. 370, 118 N. Y. S. 417.

4. *Voting Machines*

Voting machines generally: see ELECTION LAW, § 390 et seq.

Proper method of voting.— Voting machines may properly be used in an election on the local option questions. Op. Atty.-Gen. (1897) 164.

Numbering propositions.— Where constitutional amendments are presented at the same election, the amendments may be numbered from 1 to 7, and the local option questions may then follow with numbers from 8 to 11. Matter of Cipperley, (1905) 50 Misc. 266, 100 N. Y. S. 473. Or the local option propositions may begin a new series and be numbered from 1 to 4, where it does not appear that there was any confusion arising from the duplication of numbers. Matter of Webster, (1905) 50 Misc. 253, 100 N. Y. S. 508, affirmed 113 App. Div. 888, 98 N. Y. S. 1116, affirmed (1906) 186 N. Y. 536 mem. See opinion of the attorney-general to the same effect. Op. Atty.-Gen. (1905) 541. The failure to place any number on the ballots or slips placed in the machine, is not a ground for a resubmission of the questions. Matter of Merow, (1906) 112 App. Div. 562, 99 N. Y. S. 9.

Instruction card not representing face of ballots.— The failure to make the instruction cards correctly represent the face of the voting machines on a local option election, does not authorize a resubmission of the propositions. Matter of Merow, (1906) 112 App. Div. 562, 99 N. Y. S. 9.

Omission of caption.— The failure to print upon the ballot or slip placed in a machine a heading or caption preceding the questions submitted, is not such an irregularity as justifies a resubmission of the questions. Matter of Merow, (1906) 112 App. Div. 562, 99 N. Y. S. 9.

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Vacant spaces unlocked.— Where the first eight spaces in a voting machine are used for constitutional amendments, and spaces 9 to 12 are used for the local option propositions, and the machine contains four other spaces which are blank, but which are not locked, and by reason thereof they are used by some of the voters, and during a part of the election one or more cards are misplaced so as to mislead a voter, a resubmission of the local option questions may be ordered. Matter of Penner, (1912) 77 Misc. 634, 138 N. Y. S. 507. And where five columns on the right hand of the machine, on which no voting was intended to be done, are left unlocked, and some of the voters who intend to vote on the fourth proposition use one of these unlocked columns by mistake, an order for a resubmission of the questions will be granted. Matter of Keady, (1905) 3 Liq. Tax Law Rep. 532.

Misplacement of cards.— Where the bottom card containing two of the local option propositions becomes misplaced during the course of the election so as to cover a part of the card next above it, so that some of the voters may have been misled as to the proper pointer to use in voting for some of the questions, a resubmission will be ordered. Matter of Hoffman, (1911) 133 N. Y. S. 1045.

5. Conduct of Election

Registration.— No registration is required of voters as a qualification to vote at a special town meeting on the resubmission of the questions under this section. Op. Atty.-Gen. (1912) 71.

Illiterate voters.— A voter physically incapable of casting his ballot, may have the assistance of the election officers under the Election Law. Op. Atty.-Gen. (1905) 541. See Election Law, § 357.

Void ballots.— A ballot which has an erasure or which is marked other than with an X, is void under section 368 of the Election Law, and should not be counted. People v. Board of Canvassers, (1909) 65 Misc. 223, 121 N. Y. S. 365.

Effect of elector voting on both sides of one proposition.— The fact that a voter makes a cross opposite both "Yes" and "No" as to one proposition, does not invalidate the entire ballot; it is ineffectual on the particular proposition so marked with a surplus cross, but may be valid as to other propositions. Matter of Tamney, (1912) 151 App. Div. 309, 136 N. Y. S. 865, reversed on other grounds (1913) 209 N. Y. 202, N E. 567.

Congestion at polls.— Where, by reason of the growth of a village and the failure of the town to redistrict the town, there was a congested condition at the polls and over 200 voters were standing in line waiting to vote when the polls are closed, a resubmission will be ordered. Matter of Griffin, (1901) 35 Misc. 532, 71 N. Y. S. 1127.

6. Canvass of Votes and Filing of Returns

Neglect of inspectors of election.— Where every requirement of this section is complied with down to and including the opening of the polls, a resubmission will not be ordered because the inspectors of election fail to make and file a return and to seal and deliver the ballot box to the proper custodian. Matter of Norton, (1912) 152 App. Div. 628, 137 N. Y. S. 376, reversing 75 Misc. 180, 134 N. Y. S. 1030.

Vote not canvassed by town board.— Where the town board did not canvass the vote on the local option propositions, but the town clerk made up a certificate from the vote and caused the same to be filed with the county treasurer, which certificate showed that the town voted against the issuance of certificates, it was held that the county treasurer was justified in refusing to issue a certificate for traffic in such town. People v. Adair, (1904) 44 Misc. 444, 89 N. Y. S. 376.

Canvass by town clerk.— The only authority vested in the town clerk with reference to the canvass, is to file a certified copy of the result with the

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county treasurer; he has no authority to make a canvass of the ballots and then file a statement of the result as he finds it. Matter of Brown, (1902) 38 Misc. 157, 77 N. Y. S. 261.

Function of town clerk.— In filing a certified copy of the result with the county treasurer, the town clerk acts in a purely clerical or ministerial manner; he has no judicial or quasi-judicial or discretionary powers whatever. Matter of Brown, (1902) 38 Misc. 157, 77 N. Y. S. 261.

Certified copy of result.— Where a town has voted against the issuance of certificates, but the statement of the result filed with the county treasurer is not strictly a "certified copy" of the statement of the result, if it apprises the county treasurer of the result the will of the electors is not to be thwarted on account of the failure of the town clerk; and, on an application for a certificate, the court may make an order directing its issuance unless a certified copy of the result is filed showing that it would be improper to grant the certificate. People v. Hamilton, (1899) 42 App. Div. 212, 59 N. Y. S. 943, affirming 27 Misc. 308, 58 N. Y. S. 584; People v. Hamilton, (1899) 27 Misc. 360, 58 N. Y. S. 959. Though the town clerk has failed to file a certified copy of the result with the county treasurer, such officer may refuse to issue a certificate for traffic in a town which has voted against the issuance of certificates. Matter of Krumbholz, (1908) 60 Misc. 534, 113 N. Y. S. 1060. See also People v. Foster, (1899) 27 Misc. 576, 58 N. Y. S. 574. "While the Liquor Tax Law provides for the making and filing of a certificate by the town clerk, showing what was done at the town meeting, that law does not prescribe the form of the certificate." People v. Foster, (1899) 27 Misc. 576, 58 N. Y. S. 574.

Certified copy as binding county treasurer.— The certified copy of the result of the vote filed with the county treasurer is binding on the county treasurer and forms the basis of his action as to whether he shall issue certificates. Matter of Tinkcom, (1906) 50 Misc. 250, 100 N. Y. S. 467. And see, infra, § 17.

Correction of mistake in return of vote.— The court has power by mandamus to compel the inspectors of election to make a correct return of the vote on the local option propositions, and to compel such inspectors to file their tally sheets where they have failed to do so. People v. Douglass, (1911) 142 App. Div. 224, 126 N. Y. S. 908.

IV. Remedies

1. Defective Petition or Submission

Resubmission: see infra, this note, V.

Equity.— If the petition is not timely filed, an action in equity may be maintained to annul the election, and it is no defense that the electors have fairly voted on the questions and the result represents their wishes. Stuart v. Newfield, (1899) 2 Liq. Tax Law Rep. 119.

If the petition was insufficient to authorize the holding of a local option election, one injuriously affected thereby may procure an injunction to restrain the commissioner of excise and the certificate issuing officer from proceeding to his prejudice under the vote. Kennedy v. Warner, (1906) 51 Misc. 362, 100 N. Y. S. 616.

Motion to have petition declared invalid.— There is no authority for a motion to have the petition declared invalid and have it set aside, and to restrain the town clerk from the submitting the propositions. Matter of Newburgh, (1904) 97 App. Div. 438, 89 N. Y. S. 1065.

Certiorari.— Where the county treasurer has refused to issue a certificate on the ground that the result of a local option election was contrary to the issuance of certificates, on a writ of certiorari to review the action of the

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county treasurer the relator cannot attack the validity of the election. People v. Hamilton, (1899) 29 Misc. 465, 61 N. Y. S. 979; People v. Hasbrouck, (1897) 21 Misc. 188, 47 N. Y. S. 109.

Considering election as a nullity.— Where there has been an election on the local option provisions and a certificate of the town clerk has been filed with the county treasurer showing the result of the election to be against the issuance of certificates, the county treasurer cannot on the ground that the petition was insufficient treat the election as a nullity and issue certificates in accordance with the previous status of the town. Matter of Clement, (1899) 29 Misc. 29, 60 N. Y. S. 328. Where no petition has been filed for a submission of the local option provisions, it has been held that the election is illegal, and the certificate issuing officer should issue certificates in accordance with the prior legal vote. People v. Decker, (1899) 28 Misc. 699, 60 N. Y. S. 60, affirmed 48 App. Div. 638, 63 N. Y. S. 1113.

Irregularities in submission.— For irregularities in the submission of the local option propositions, the remedy is an order for a resubmission, not a mandamus to compel the inspectors of election to reconvene and reject the ballots. People v. Mein, (1901) 66 App. Div. 615, 72 N. Y. S. 479; Matter of O'Hara, (1901) 63 App. Div. 512, 71 N. Y. S. 613; Matter of Myers, (1901) 2 Liq. Tax Law. Rep. 593; People v. Board of Town Canvassers, (1900) 32 Misc. 123, 66 N. Y. S. 199. Where there is an error in the submission of the local option questions, the only remedy available is the procedure authorized by the statute for a resubmission; one cannot maintain an action in equity to have the election set aside and certificates issued in accordance with the vote at an earlier election. Raymond v. Clement, (1907) 118 App. Div. 528, 102 N. Y. S. 1070, affirmed on opinion below (1909) 194 N. Y. 560, 87 N. E. 1126.

2. Irregularities in Conduct of Election, Canvass, or Returns

Defective ballots.— The remedy for a defective ballot is an application for a resubmission under this section; a writ of mandamus cannot be issued to require the inspectors of election to reconvene and reject the defective ballots. People v. Mosso, (1899) 30 Misc. 164, 63 N. Y. S. 588.

Void or rejected ballots.— A common law writ of mandamus will not lie to compel the inspectors of election to act in a particular manner with reference to the void or rejected ballots cast on the local option propositions. People v. Hanes, (1904) 44 Misc. 475, 90 N. Y. S. 61. A hotel keeper affected by the result of a local option election cannot procure a writ of mandamus to compel the inspectors of election to count certain ballots which were returned by them as void. Matter of Tamney, (1913) 209 N. Y. 202, 102 N. E. 567, reversing 151 App. Div. 309, 136 N. Y. S. 865.

Erroneous returns.— The court has power by mandamus to compel the inspectors of election to make a correct return of the vote on the local option propositions, and to compel such inspectors to file their tally sheets, where they have failed to do so. People v. Douglass, (1911) 142 App. Div. 224, 126 N. Y. S. 908.

Recount.— Under section 381 of the Election Law, it has been held that a writ of mandamus may be issued to compel a recount of the local option ballots. People v. Parmelee, (1898) 22 Misc. 380, 50 N. Y. S. 451.

Opening ballot box.— Under section 374 of the Election Law, the ballot box may be opened after election. People v. Douglass, (1911) 143 App. Div. 750, 128 N. Y. S. 547. But such an application will be denied where no judicial proceedings relative to the election are pending and it does not appear that any will be brought. Matter of Ulrich, (1910) 67 Misc. 196, 122 N. Y. S. 601. The proceeding essential to such an application is something more than a mere proceeding in matter of form or a proceeding commenced for the purpose of an examination of the ballots in order to discover whether there is a cause of action. Matter of Ulrich, (1910) 123 N. Y. S. 381.

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Application to set aside canvass and return.— An application to set aside the return and canvass of the vote on the local option propositions, has been entertained; and it was held that the filing of a petition for resubmission as provided in this section was not a condition precedent to the maintenance of the application. Matter of Bertrend, (1903) 40 Misc. 536, 82 N. Y. S. 940.

V. Resubmission

1. Grounds

In general.— The "sufficient reason" which must be shown to procure an order for the resubmission of the questions, is the same as "any reason" which makes the election improper. Matter of LaFayette, (1905) 105 App. Div. 25, 93 N. Y. S. 534. "It is settled by authority where, by reason of any defect in voting machines or otherwise, the electors have not had a fair opportunity to vote the excise questions and have their votes properly registered or recorded, whereby the wishes of the majority of the voters who have exercised or attempted to exercise their right to vote upon these questions may not have been correctly ascertained, that then the excise questions are deemed not to have been properly submitted and they should be resubmitted at a special town meeting called for that purpose." Matter of Hoffman, (1911) 133 N. Y. S. 1045.

Defective petition.— A resubmission of the local option questions will not be ordered under this section on the ground that the petition was defective or insufficient. Matter of Rogers, (1903) 41 Misc. 389, 84 N. Y. 1024; Matter of Getman, (1899) 28 Misc. 451, 59 N. Y. S. 1013. Nor will a resubmission be had because the petition was filed in the county clerk's office instead of in the office of the town clerk. Matter of Krieger, (1901) 59 App. Div. 346, 69 N. Y. S. 851.

"If the petition is defective, insufficient, and not a legal petition, life cannot be infused into it by an order of the court providing for resubmission. It is a condition precedent for an order for resubmission, that a legal petition was presented, requesting a submission of such questions." Matter of Cipperley, (1905) 50 Misc. 266, 100 N. Y. S. 473.

Alteration of petition.— The removal of the petition from the office of the town clerk after its filing and the interlineation therein of the words "if a majority of the votes cast on the first proposition are in the negative," in connection with the fourth proposition relative to hotels, does not affect the validity of the election so as to defeat an application for a resubmission on the ground that the ballots were defective. Matter of Quick, (1905) 3 Liq. Tax Law Rep. 540.

Failure to file certified copy of petition with county clerk.— A resubmission will not be ordered for a failure of the town to file a certified copy of the petition with the county clerk, where the election is not held at the time of the general election. Matter of Quick, (1905) 3 Liq. Tax Law Rep. 540. Nor will a resubmission be ordered for the delay in filing the copy, where it was filed more than twenty days prior to the election, though the filing of the copy was delayed for seven days after the receipt of the original by the town clerk. Matter of Rice, (1904) 95 App. Div. 28, 88 N. Y. S. 512.

Failure to post and publish notices.— A failure to post and publish the notices of the election as required in this section, requires a resubmission of the questions. Matter of Livingston, (1907) 189 N. Y. 549, 82 N. E. 1133; Matter of Moore, (1914) 161 App. Div. 953, 146 N. Y. S. 1101; Matter of LaFayette, (1905) 105 App. Div. 25, 93 N. Y. S. 534; Matter of O'Hara, (1901) 63 App. Div. 512, 71 N. Y. S. 613; Matter of Smith, (1904) 44 Misc. 384, 89 N. Y. S. 1006; Matter of Sullivan, (1901) 34 Misc. 598, 70 N. Y. S. 374; Matter of Afton, (1905) 3 Liq. Tax Law Rep. 519; Matter of Pitkin, (1901) 2 Liq. Tax Law Rep. 539. And see, supra, the cases cited under subdivision III-1 of this note.

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Ballots.— An irregularity in the ballot submitted to the voters may be ground for a resubmission of the questions. See cases cited, supra, III-3. The courts cannot say whether an elector has been misled by a defective ballot; and, if the ballot is irregular, a resubmission will be ordered, though it is urged in opposition to the order that no one was misled by the ballot as voted. Matter of Rice, (1903) 2 Liq. Tax Law Rep. 280.

Voting machines.— An order for the resubmission of the local option propositions may be granted, where the election was conducted by means of voting machines, and unlocked spaces were permitted in the machine or the cards in the machine were permitted to become misplaced. Matter of Penner, (1912) 77 Misc. 634, 138 N. Y. S. 507; Matter of Hoffman, (1911) 133 N. Y. S. 1045; Matter of Keady, (1905) 3 Liq. Tax Law Rep. 532. And see, supra, III-4.

Irregularity in canvass.— The canvass of the votes on the local option propositions is a part of the submission of the questions, and a resubmission of the questions may be ordered for irregularities in such canvass, if they are such as might have affected the result of the vote; but, when the irregularties are not such as would have affected the result, a resubmission will not be ordered. Matter of Clancy, (1908) 58 Misc. 258, 109 N. Y. S. 644; Matter of Burrell, (1906) 50 Misc. 261, 100 N. Y. S. 470.

Injury to business interests.— If there is no other ground justifying a resubmission of the local option questions, an order for a special town meeting will not be granted because it is alleged that the business interests of the community will be injured unless the sale of liquor is permitted. Matter of Cipperley, (1905) 50 Misc. 266, 100 N. Y. S. 473. But see Matter of Smith, (1904) 44 Misc. 384, 89 N. Y. S. 1006, where the feared injury to the business interests of the town was apparently considered, in connection with irregularities in the election, and a resubmission was ordered.

Refreshments near polls.— The service by ladies of coffee and doughnuts within 100 feet of the polls is not a sufficient ground for a resubmission. Matter of Cipperley, (1905) 50 Misc. 266, 100 N. Y. S. 473.

Congestion at polls.— Where, by reason of the growth of a village and a failure to redistrict the town, there was congested condition at the polls, and over 200 voters were standing in line to vote when the polls closed, a resubmission was granted. Matter of Griffin, (1901) 35 Misc. 532, 71 N. Y. S. 1127.

Second resubmission.— The courts have no authority to order a second resubmission of the local option propositions for irregularities in the submission at the special election. Matter of Farley, (1913) 158 App. Div. 840, 143 N. Y. S. 1070.

2. Procedure

Resubmission at regular town meeting.— There is no authority for an order directing the resubmission of the local option propositions at a regular town meeting; the submission must be made, if at all, at a special town meeting called as provided in this section. Matter of LaFayette, (1905) 105 App. Div. 25, 93 N. Y. S. 534.

Delay in application.— Where the application for a resubmission is not made until eleven months after the election, the Appellate Division will not order a resubmission, when the petitioner can get as speedy relief under the statute without an order for resubmission. Matter of LaFayette, (1905) 105 App. Div. 25, 93 N. Y. S. 534.

Voluntary appearance before court.— The parties to an application for a resubmission may voluntarily appear before one of the tribunals mentioned in this section without notice, so that a County Court will have jurisdiction of the application, though the petition is addressed to a county judge. Matter of Munson, (1904) 95 App. Div. 23, 88 N. Y. S. 509.

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Intervention by electors and taxpayers.— Taxpayers and electors should not be allowed to intervene at a hearing on an application for a resubmission, where they give no notice and make no formal application for intervention. Matter of Munson, (1904) 95 App. Div. 23, 88 N. Y. S. 509. See also Matter of Munson, (1903) 3 Liq. Tax Law Rep. 278. As the statute read in 1903, there was no authority for electors to intervene. Matter of Rice, (1903) 3 Leg. Tax Law Rep. 280.

Petition for resubmission filed before order.— Where the petition for a resubmission is filed some time before the return day of application for the resubmission so that a literal compliance cannot be made with the provisions of the statute relative to the call of the special election, the order may nevertheless be granted. Matter of Sullivan, (1900) 30 Misc. 682, 64 N. Y. S. 303.

Ex parte order.— Under the Liquor Tax Law as it existed in 1900, while it was proper for the court or judge to whom the application was made to require notice thereof to be given to the state commissioner of excise or to the county treasurer of the county, it was entirely a matter of discretion, and the order for a resubmission could be made upon an ex parte hearing. People v. Ely, (1900) 2 Liq. Tax Law Rep. 398.

3. Conduct of Election

Officials.— A special town meeting ordered under this section is in a sense a continuation of the regular town meeting, and should be conducted by the officers who conducted the regular meeting. Op. Atty.-Gen. (1912) 71. When the regular town meeting was held at the time of the general election, the inspectors of election at such election will officiate. Op. Atty.-Gen. (1901) 315.

Registration.— Registration is not a necessary qualification to vote at a special town meeting. Op. Atty.-Gen. (1901) 315.

Effect of votes at irregular election, when resubmission is had.— Where a resubmission of the propositions has been legally had, no effect will be given to the prior vote, and the court will not grant a mandamus requiring the town canvassers to reconvene and reject the ballots cast at such irregular election. People v. Board of Town Canvassers, (1900) 32 Misc. 131, 66 N. Y. S. 197.

VI. Effect of Vote

Tie vote at 'ocal option election: see 49 L. R. S. (N. S.) 1204 note.

Effect on lease of property for saloon or passage of prohibitory laws during the term: see the following notes: 34 L. R. A. (N. S.) 773, 23 L. R. A. (N. S.) 497; 19 L. R. A. (N. S.) 964.

Validity of statute forbidding bringing of liquor into prohibition territory: see Ann. Cas. 1917A 740 note: 14 Ann. Cas. 569 note. *Duty of carrier to accept liquor for transportation to points where its sale is prohibited or restricted:* see 45 L. R. A. (N. S.) 120 note; 40 L. R. A. (N. S.) 798 note. *Whate constitutes solicitation of orders in prohibition territory:* see Ann. Cas. 1915D 736 note. *Loan of intoxicating liquors as sale within purview of prohibitory statute:* see 14 Ann. Cas. 276 note; Ann. Cas. 1913A 471 note.

Change in time vote takes effect.— Under the Liquor Tax Law of 1896, as it existed prior to April 21, 1908, the excise year began May 1st and ended April 30th. In 1908 the law was amended so that the year commences October 1st and ends September 30th. Where a town had voted in favor of the issuance of certificates, but in November, 1907 voted against the issuance of certificates, it was held that a liquor tax certificate could be issued for the interval between May 1 and September 30, 1908. People v. Bashford, (1908) 128 App. Div. 351, 112 N. Y. S. 502, wherein it was said: "There can be no doubt that the Legislature has the power to pass what are known as local

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option laws. Having the right to pass local option laws carries with it the right to fix a time when licenses shall cease in a town which has voted against the granting of liquor licenses. The Legislature having the right to fix the date on which the sale of liquors shall commence in towns which have voted in favor of license, and also the right to fix the date on which the sale of liquors shall cease in towns which have voted against the license, it necessarily follows that the Legislature has the power to change these dates, unless by so doing the constitutional provision which forbids the passing of laws impairing the obligation of contracts is violated, which appears not to be the case, for liquor tax laws are enacted under what is known as the police power of the state." A different conclusion as to the effect of the change was reached in People v. Moore, (1908) 59 Misc. 533, 112 N. Y. S. 475.

On a vote favorable to the issuance of licenses had at an election in Februray, certificates will not be issued to take effect until October 1st. Op. Atty.-Gen. (1911) 139.

Storekeepers license in place under 7,500 population.— Though this section may require the submission of proposition number 2 for the sale of liquors not to be drunk on the premises, the issuance of a certificate for such traffic is forbidden by subdivision 10 of section 8 as to places having a population under 7,500. People v. Holmes, (1915) 90 Misc. 63, 154 N. Y. S. 163.

Sale by hotel keeper of liquors not to be drunk on premises.— When the result on proposition 4 is in the affirmative, but the result on proposition 2 is in the negative, a hotelkeeper cannot sell liquor not to be drunk on the premises. Prior to 1910 the law permitted a hotelkeeper to sell off the premises. People v. Yarter, (1912) 152 App. Div. 566, 137 N. Y. S. 462.

Revocation of certificate procured contrary to vote.— A certificate issued for traffic in a town which has voted against the issuance of certificates, will be revoked under section 27. Matter of Lyman, (1899) 28 Misc. 278, 59 N. Y. S. 828.

Destruction of hotel after favorable vote on fourth proposition.— Where the fourth proposition is the only one carried in the affirmative, a license issued to a hotel keeper authorizes him to sell liquors in connection with the hotel; if his hotel is destroyed by fire, his right to traffic in liquors is lost and he may be convicted for an illegal sale upon other premises. People v. Corey, (1909) 133 App. Div. 456, 118 N. Y. S. 23.

§ 14. Local option to determine whether liquors shall be sold under the provisions of this chapter in the several localities herein named. The board of trustees of the village of Stanford, Delaware county, are authorized and empowered by resolution to submit to the electors of such village the question mentioned in section thirteen of this chapter, at every second annual charter election held in such village, dating from that held in the year eighteen hundred and ninety-nine. Whenever the board of trustees shall by resolution submit such questions to the electors of such village, the clerk of the village shall cause to be prepared ballots in the same form and manner as is provided in section thirteen of this chapter subsituting the name of the village for the name of the town. The votes cast at any such meeting or election upon such questions shall be canvassed in the same manner as other questions or propositions submitted to a

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village meeting or election as provided by the charter of such village. If a majority of the votes upon either of such questions is in the negative, no liquor tax certificate shall be issued to any person within such village under the subdivision or subdivisions of section eight, upon which the vote shall be in the negative. If a majority of the votes upon either of such questions shall be in the affirmative, a liquor tax certificate shall be issued by the county treasurer, under the subdivision or subdivisions of this chapter upon which the vote shall be in the affirmative to an applicant therefor residing within such village upon the compliance with the provisions of this chapter by such applicant. The traffic in liquors in such village, except as prescribed in this paragraph, is subject to the provisions of this chapter. The electors of such village shall not vote upon questions relating to the sale of liquors at any town meeting. The questions relating to the sale of liquors in the several towns in the counties of Sullivan, Orange and Rockland, as prescribed in section thirteen of this chapter, may be submitted in such towns biennially, at the town meeting held at the time of the general election dating from that held in the year nineteen hundred and one, and liquor tax certificates shall be issued pursuant to the vote upon the questions so submitted, as provided by this chapter.

The first five sentences of this section were derived from L. 1897, ch. 775, § 1. The last sentence was derived from L. 1898, ch. 497, § 1.

Section 14 of the Liquor Tax Law of 1896 is now covered by section 11.

Relation to section 13.— This section with reference to elections in Sullivan County does not change the general provisions of section 13 with reference to local option elections generally, and hence a valid petition as required by section 13 is necessary for a submission of the propositions in Sullivan County. People v. Decker, (1889) 28 Misc. 699, 60 N. Y. S. 60, affirmed 48 App. Div. 638, 63 N. Y. S. 1113.

Special act for village of Olcott.— Chapter 458 of the Laws of 1903, authorizing an election in the hamlet of Olcott, town of Newfane, Niagara county, was construed as a temporary act in force until the regular election in 1907. Killinger v. Clement, (1909) 131 App. Div. 461, 115 N. Y. S. 407.

§ 15. Statements to be made upon application for liquor tax certificates. Every person to become liable for a tax under subdivision one, two, three, six or seven of section eight of this chapter assessed on the first day of October, of each year, shall on or before the fifteenth day of September next preceding; and every person to become liable for any portion of such tax assessed after said date shall sufficiently in advance

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thereof prepare and make upon the blank which shall be furnished by the county treasurer of the county or by the special deputy commissioner of excise, if there be one, upon application therefor, a statement which shall be given to such county treasurer or special deputy, signed and sworn to by such applicant or applicants, or by the person making such application in behalf of a corporation or association, stating:

1. The name of each applicant, and if there be more than one and they be partners, also their partnership name, and the age and residence of the several persons so applying, and the fact as to his citizenship.

2. The name and residence of every person interested or to become interested in the traffic in liquors for which the statement is made, unless such applicant be a corporation or association, in which case the person making the application in behalf of the corporation or association shall set forth, instead, the name of the corporation or association, the state under the laws of which it is organized, and the nature of his authority to act for such corporation or association.

3. The premises where such business is to be carried on, stating the street and number, if the premises have a street and number, and otherwise such apt description as will reasonably indicate the locality thereof, and also the specific location on the premises of the bar or place at which liquors are to be sold. The applicant or applicants shall also state whether or not there has been filed with the certificate issuing officer a notice of abandonment pursuant to the provisions of subdivision nine or ten of section eight of this chapter by virtue of which traffic in liquors under the provisions of subdivision one or two of said section eight may lawfully be carried on at the premises described in the application statement; together with the date of the filing of such notice, the name of the person or persons filing the same, and a description of each of the premises affected thereby, also whether or not the applicant or applicants claim the right to traffic in liquors at said premises by reason of being the highest bidder or bidders therefor pursuant to any of the provisions of subdivision nine or ten of said section eight.

4. Under which subdivision of section eight of this chapter the traffic in liquors is to be carried on, and what, if any, other business is to be carried on in connection therewith, or on the

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same premises, by the applicant or any other person; and also what, if any, other business is to be carried on by the applicant or by another in any room adjoining, which is not entirely separated from the room in which the traffic in liquors is to be carried on, by solid partition at least three inches thick extending from floor to ceiling, without any opening therein.

5. And a statement that such applicant has not been convicted of a felony; has not been convicted of a violation of this law within three years prior to the date of such application; does not, as owner or agent, carry on, or permit to be carried on, nor is interested in any traffic, business or occupation, the carrying on of which is a violation of law, and may lawfully carry on such traffic in liquors upon such premises, under such subdivision, and is not within any of the prohibitions of this chapter. Also how many buildings occupied exclusively as dwellings there are, the nearest entrance to which is within two hundred feet measured in a straight line, of the nearest entrance to the premises where the traffic in liquors is intended to be carried on, and whether the applicant intends to traffic in liquors under the certificate applied for in any building, yard, booth, or other place, which is on the same street or avenue and within two hundred feet of a building occupied exclusively as a church or schoolhouse, and if either question is answered affirmatively that there are any such dwellings, church or school buildings, then said applicant shall also state whether such traffic in liquors was actually lawfully carried on in such premises on March twenty-third, eighteen hundred and ninety-six, and if yes, the date since which said premises have been continuously occupied for such traffic in liquors; also if the applicant intends to traffic in liquors under the certificate applied for in any buildings, yard, booth, or other place, which is on the same street or avenue and within two hundred feet of a building occupied exclusively as a church or schoolhouse, then said applicant shall state the date since which said premises have been continuously lawfully occupied for such traffic in liquors and the date since which a building or buildings on the same street or avenue and within two hundred feet of said premises has been occupied exclusively as a church or schoolhouse; also whether said premises were actually occupied as a hotel on March twenty-third, eighteen hundred and ninety-six, and if yes,

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the date since which said premises have been continuously occupied as a hotel, and if no, the date since which the said premises have been continuously occupied for a hotel and the date since which a building or buildings on the same street or avenue within two hundred feet of said premises have been occupied exclusively as a church or schoolhouse; also whether any liquor tax certificate for traffic in liquors in such premises has been revoked or forfeited since the first day of May, nineteen hundred and twelve; and if yes, the date of the entry of the latest final order revoking or the date of the latest conviction or judgment forfeiting the same, and whether the violation for which such revocation or forfeiture was had was that the certificated premises had been suffered or permitted to be disorderly or that gambling had been suffered or permitted therein; also whether any person has been convicted since said date of a violation of the provisions of clause e of section thirty of this chapter relating to gambling or disorder or of section eleven hundred and forty-six or of any section of article eighty-eight of the penal law committed in such premises by the holder of a liquor tax certificate or his agent, or in any premises which have or had any opening or means of entrance or passageway for persons or things between the premises where such violation occurred and the premises where the traffic in liquors is intended to be carried on; and if yes, the date of the latest conviction of any such person for such violation; also whether traffic in liquors was actually discontinued at said premises by reason of any such revocation or conviction; and if yes, the date when such traffic in liquors was actually discontinued.

6. There shall also be so filed simultaneously with said statement, a consent in writing that such traffic in liquors be so carried on in such premises, executed by the owner of the premises, or by his duly authorized agent, and acknowledged as are deeds entitled to be recorded; except in cases where such traffic in liquors was actually lawfully carried on in said premises so described in said statement on the twenty-third day of March, eighteen hundred and ninety-six, in which case such consent shall not be required.

7. If such traffic is to be carried on in any building or place owned by the public, or in any building or place situate on land owned by the public, such applicant or applicants shall at the

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same time file with such county treasurer, or special deputy, the written consent of the authorities having the custody and control of such building, and of the land on which it is situated for the traffic in liquors therein.

S. P. 27 8. When the nearest entrance to the premises described in said statement as those in which traffic in liquors is to be carried on is within three hundred feet, measured in a straight line, of the nearest entrance to a building or buildings occupied exclusively for a dwelling, there shall also be filed simultaneously with said statement a consent in writing that such traffic in liquors be so carried on in said premises during a term therein stated, executed by the owner or owners, or by a duly authorized agent or agents of such owner or owners of at least two-thirds of the total number of such buildings within three hundred feet so occupied as dwellings, and acknowledged as are deeds entitled to be recorded, except that such consent shall not be required in cases where such traffic in liquor was actually lawfully carried on in said premises so described in said statement on the twenty-third day of March, eighteen hundred and ninety-six, nor shall such consent be required for any place described in said statement which was occupied as a hotel on said last mentioned date, notwithstanding such traffic in liquors was not then carried on thereat. Whenever the consent shall have been obtained and filed as required by law at the time of such filing, unless the same be given for a limited term, no further or other consent for trafficking in liquor on such premises shall be required so long as such premises shall be continuously occupied for such traffic.

9. If the traffic in liquors is to be carried on in connection with the business of keeping a hotel, the applicant shall also show by his application that all the requirements of section thirty hereof, defining hotels, have been complied with.

10. When such applicant shall be a duly licensed pharmacist desiring to traffic in liquors as such, under subdivision three of section eight of this chapter, he shall file with such county treasurer, or special deputy commissioner, in addition to the other statements required by this chapter, a verified statement also showing that said applicant is a licensed pharmacist in good standing, actually carrying on and doing business as a pharmacist on his own account at the place or store where he desires to so

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traffic in liquor, that the principal business which will be transacted by said applicant in said place or store, during the period to be covered by the certificate applied for, is the dispensing and retailing of drugs and medicines, that said applicant has not, during the year last past, allowed any liquor so sold in said place or store to be drunk therein, or otherwise violated any of the provisions of this chapter. Every person liable for a tax under subdivision four of section eight of this chapter shall, on or before the first day of October of each year, prepare and make upon a blank, which shall be furnished by the state commissioner of excise, such statement in regard to carrying on such traffic as the commissioner may require, including the statement required under clauses one, two and five of this section, which statement shall be given to the state commissioner of excise, signed and sworn to by such applicant or applicants, or by the person making such application in behalf of a corporation or association.

11. Upon receiving such statement, the same shall be filed in the office of such county treasurer, special deputy commissioner of excise, or state commissioner of excise, to whom the same is given as herein provided, who shall indorse thereon the date of the receipt of the same, the amount of tax paid by or on behalf of said applicant, the date of the issuing of the liquor tax certificate thereon, the number of the same, the premises where such business is to be carried on, and under which subdivision of section eight said certificate is issued. Said indorsement shall be signed by the said county treasurer, special deputy commissioner of excise, or state commissioner of excise, in whose office the same is filed, and such indorsement shall be received in evidence in all courts of this state and shall be competent and sufficient prima facie evidence of all the facts stated therein.

This section was derived from the Liquor Tax Law of 1896, § 17, as amended by L. 1897, ch. 312, § 10; L. 1900, ch. 367, §§ 4, 5; L. 1905, ch. 677, §§ 1, 2; L. 1907, ch. 345, § 6; L. 1908, ch. 144, § 4, and L. 1908, ch. 350, §§ 2, 3.

Subdivision 3 was amended to read as above by L. 1910, ch. 494, § 2, and L. 1913, ch. 168, § 2. The amendment by L. 1910 added that portion of the subdivision following the first sentence, except the references to sections 2 and 10 which were added by the amendment by L. 1913.

Subdivision 5 was amended to read as above by L. 1909, ch. 281, § 5; L. 1911, ch. 643, § 1, and L. 1915, ch. 654, § 3. The amendment of 1909 struck out a comma between the words "actually" and "lawfully" in the second sentence. The amendment by L. 1911, added the words "also if the applicant intends . . . . . or schoolhouse" after the first semi-colon, in the second sentence and added the words "and if no . . . . or schoolhouse" following

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the word "hotel" toward the end of the section. The amendment by L. 1915, changed the date since when a revocation of a certificate had been made, from 1905 to 1912; also added the last part of the section, "also when any other person had been convicted . . . . was actually discontinued."

Subdivision 8 was amended to read as above by L. 1910, ch. 485, § 5; L. 1910, ch. 503, § 2; L. 1911, ch. 643, § 2; L. 1912, ch. 378; L. 1915, ch. 654, § 4. Until the amendment by L. 1915, the amendments to the subdivision were along the line of specialization and minuteness in the provisions. The amendment of 1915 omitted many of these provisions and made the subdivision to read, substantially, the same as did the first two sentences of the subdivision when enacted in 1909.

Section 15 of the Liquor Tax Law of 1896 is now covered by section 12.

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I. Generally

False statement in application as ground for revocation of certificate: see, infra, § 27, subd. 2.

Necessity of proper application.—A liquor tax certificate should not be issued except on an application that is correct in form and that complies with the law." Farley v. Aprile, (1914) 86 Misc. 75, 148 N. Y. S. 275.

Construction of statements.—The declarations of an applicant should not be construed strictly against him, if there is an evident intention to comply with the spirit of the law. Matter of Purdy, (1899) 40 App. Div. 133, 57 N. Y. S. 629.

Notice of abandonment.—Subdivision 3 requires an applicant to state whether there has been filed a notice of abandonment pursuant to the provisions of subdivision 9 or 10 of section 8, but there is no express provision in the statute authorizing or permitting the applicant to state whether or not the notice of abandonment is null or void. Farley v. O'Brien, (1915) 91 Misc. 89, 154 N. Y. S. 1021. Where an applicant states that no certificate of abandonment has been filed, when in fact one has been filed but it is void, the certificate issuing officer may issue a certificate, and it will not necessarily be revoked under section 27 on account of the inaccurate statement. Farley v. Miller, (1916) 216 N. Y. 449, 111 N. E. 66.

Statement of number of dwellings and continuity of traffic.—When this section was originally enacted, it did not require that the application contain a statement of the number of dwellings within the prescribed distance. Matter of Lyman, (1898) 23 Misc. 710, 53 N. Y. S. 52. And as subdivision 5 read in 1900, it was not necessary that the application state whether the traffic in liquors within the prescribed distance of a church, schoolhouse, or nearby dwellings had been continuous since March 23, 1896, and it was held that such

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a statement in an application was immaterial, and was not a "false statement" within the meaning of section 27, authorizing a cancellation of a certificate for a false statement in the application. Matter of Hawkins, (1900) 165 N. Y. 188, 58 N. E. 884.

If the application fails to mention a dwelling within 200 feet of the nearest entrance to the applicant's premises, the certificate issued on the application will be canceled, though the applicant at the time of making the application intended to, and thereafter actually did, change the entrance to his premises so that such dwelling was not within the prescribed distance. People v Pettit, (1908) 128 App. Div. 870, 113 N. Y. S. 243.

Application for hotel certificate.— The character of premises for the purpose of issuing a liquor tax certificate thereon, must be determined from the application for such certificate; and if the premises are to be used as a hotel such application must state that fact; otherwise, no matter how full or ample its structural requirements may be, no liquor tax certificate can be issued conferring the privilege of conducting a hotel on such premises. People v. Hegeman, (1812) 75 Misc. 163, 135 N. Y. S. 90. And see, supra, section 8.

A certificate will not be revoked on the ground that when an applicant for traffic in a hotel made his application, the bedrooms were not actually completed so as to meet the requirements of section 30, where there was sufficient space for the rooms and the owners of the property were actively engaged, in evident good faith, in preparing them and they were actually completed and furnished in the manner required by law within a month of the granting of the certificate. Matter of Purdy, (1899) 40 App. Div. 133, 57 N. Y. S. 629. And see, infra section 27, subdivision 2, as to when a certificate will be revoked.

"Locality" of premises.— The use of the term "locality" in connection with "premises," was cited in People v. Hegeman, (1916) 174 App. Div. 715, 160 N. Y. S. 531, as indicating the meaning of "locality" as used in section 25, infra.

Cited.— People v. Farley, (1914) 163 App. Div. 100, 148 N. Y. S. 412, affirmed (1915) 214 N. Y. 607 mem.; Farley v. Dittmann, (1913) 155 App. Div. 363, 140 N. Y. S. 321, affirmed without opinion, (1914) 213 N. Y. 659, 107 N. E. 1077; Matter of Farley, (1916) 154 App. Div. 282, 138 N. Y. S. 1050, affirmed on opinion below, (1913) 208 N. Y. 595, 102 N. E. 1102; People v. Shults, (1914) 87 Misc. 348, 149 N. Y. S. 913, affirmed 166 App. Div. 868, 151 N. Y. S. 910; Op. Atty.-Gen. (1913) 532.

II. Consent of Owner of Premises

Who is owner.— The "owner" referred to in subdivision 6, is the holder of the legal title, the person in whom the fee of the property is vested; and one purchasing property on a contract, the deed to be delivered at a subsequent time, is not the "owner." Matter of Selig, (1903) 3 Liq. Tax Law Rep. 106. But see Matter of Clement, (1908) 93 Misc. 563, 157 N. Y. S. 434, holding that one having possession of premises under a contract of purchase is an "owner" within the meaning of subdivision 8.

Exception in favor of certain tenants.— The exception in subdivision 6 of this section has been held to apply only to such tenants as were such on the 23rd of March, 1896. People v. Michell, (1897) 1 Liq. Tax Law Rep. 136.

Change in ownership.— Where the consent of the owner of the premises has been secured and filed, a change in the ownership does not require the consent of the new owner to be annexed to a new application, but the original consent, if not given for a limited period, remains effective so long as the premises are occupied continuously for the liquor traffic. Matter of Cowles, (1901) 34 Misc. 447, 69 N. Y. S. 756.

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Consent by one of joint owners.— One of three joint owners of premises where traffic in liquors is carried on, may execute a consent for such traffic in behalf of all the owners, where he is authorized to make such consent by his associates. Matter of Cowles, (1901) 34 Misc. 447, 69 N. Y. S. 756.

Revocation of certificate when owner does not consent.— Where the consent of the owner of the premises is not attached to the application, the certificate granted thereupon may be revoked in a proceeding under section 27, subdivision 2. Matter of Selig, (1903) 3 Liq. Tax Law Rep. 106.

Failure to give consent as defense to action for rent.— In an action for the rent of premises leased for the purposes of a saloon, the defendant interposed the defense that the owner had refused to give the consent required by subdivision 6 of this section; but upon the trial it appeared that the owner had not refused to consent to the traffic by the tenant but had refused to make the required consent for an application by the tenant's husband, and it was held that the defense was not established. Guth v. Mehling, (1903) 84 App. Div. 586, 82 N. Y. S. 1018.

Refusal by landlord to give consent.— Where a lease provides that the premises shall "be occupied ..... and not otherwise," parol evidence is not admissible to show that the intention was to use the premises for the sale of liquor. Nostrand v. Hughes, (1900) 54 App. Div. 602, 67 N. Y. S. 72.

Liability of lessor representing himself as owner.— Where one having a twenty-one year lease of premises states to a prospective tenant that he is the owner of the premises, and such tenant spends a considerable sum in equipping the place for the sale of liquors but is unable to procure a certificate for the liquor traffic because such person is not the owner and the real owner will not execute the consent, he cannot recover the amount of such expenses from the lessor in the absence of proof of fraud. Zagarino v. Kurzrok, (1909) 135 App. Div. 763, 119 N. Y. S. 907.

III. Annexation of Consents of Nearby Owners

1. Generally

Consent of abutting owners to issuance of liquor license: see 1 Ann. Cas. 69 note.

Purpose of provision requiring consents.— The provisions of the act relating to consents were not enacted for the benefit of persons proposing to engage in the liquor traffic, but were enacted as an additional protection to the residents of a particular locality, so that the county treasurer may not, by a certificate issued by him, authorize the establishment of a saloon at a particular place, unless at least two-thirds of the owners of buildings occupied exclusively as dwellings, situate within 300 feet of such place, are willing and consent thereto, at the time such certificate is issued. Matter of Adriance, (1901) 59 App. Div. 440, 69 N. Y. S. 314. "The provisions as to requiring the consents of the owners of dwellings were made for the benefit of the public, and no mistake, collusion or fraud on the part of the treasurer, or the applicant, or both, could make a certificate or the traffic in liquors legal in a case where such consents were necessary, unless the consents were actually filed." Lyman v. Kane, (1901) 57 App. Div. 549, 67 N. Y. S. 1065. "The spirit and purpose of this law is to regard specially the privacy of dwellings, and to uphold the rights of owners in a residential section, by protecting them against the approach and intrusion of this traffic in liquors." Matter of Bennett, (1912) 76 Misc. 310, 136 N. Y. S. 910.

Contract to pay monentary consideration for consent.— A contract whereby one desiring a liquor tax certificate for certain premises agrees to pay the owner of a dwelling within the prescribed distance a sum of money for his consent to the traffic, is against public policy and void. Riggs v. Ryan, (1907) 121 App. Div. 301, 106 N. Y. S. 39.

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Power of county treasurer to determine number of dwellings within prescribed distance.— Before the amendment to the statute in 1897, the Liquor Tax Law of 1896 vested in the county treasurer authority to determine whether the required number of consents were properly filed, and did not require him to take his information on the subject solely from the applicant. People v. Hoag, (1896) 11 App. Div. 74, 42 N. Y. S. 886. See, infra, section 17 as to the present power of the certificate issuing officer. The determination of the certificate issuing officer that the proper number of consents is filed is not such a judicial finding that it will preclude the commissioner of excise from maintaining a proceeding for the revocation of the certificate under section 27 on the ground that the required consents have not been filed. Matter of Lyman, (1898) 23 Misc. 710, 53 N. Y. S. 52.

2. Necessity of Consents

Subsequent filing of consents.— It is necessary that the application have the required consents annexed at the time the application is presented to the certificate issuing officer; where they are not so annexed and a proceeding is commenced to revoke the certificate, it will not avail the certificate holder to procure and file such consents between the time of the commencement of the proceeding and its final determination. Matter of Tonatio, (1900) 49 App. Div. 84, 63 N. Y. S. 560; Matter of Bridge, (1898) 25 Misc. 213, 55 N. Y. S. 54, affirmed on opinion below 36 App. Div. 533, 55 N. Y. S. 54. There is no authority for the courts to permit the consents to be filed *nunc pro tunc*. Matter of Lord, (1900) 32 Misc. 233, 66 N. Y. S. 252. The fact that the certificate holder acted in good faith believing the consents annexed to the petition to be sufficient, will afford no defense to the proceeding to cancel the certificate. Lyman v. Murphy, (1900) 33 Misc. 349, 68 N. Y. S. 490. But see Matter of Johnson, (1896) 18 Misc. 498, 42 N. Y. S. 1074, where the proceeding for revocation was dismissed, the certificate holder having procured and filed the necessary consents after the commencement of the proceeding. Subdivision 8 provides that the consents shall be filed simultaneously with the application, and therefore consents previously filed in connection with the application of other persons for a certificate cannot avail a subsequent applicant for the same premises. Matter of Griffin, (1907) 56 Misc. 21, 106 N. Y. S. 24.

Certificate revoked though premises are two inches within prescribed distance.— Where, after the holder of a certificate had been convicted of running a disorderly house and his certificate was thereupon revoked, a new certificate was issued to his stepdaughter for traffic in a newly constructed rough shack eight feet in the rear of the premises, it was held that such certificate would be revoked for failure to secure the required consents, though the premises lacked but two and two-fifths inches of the prescribed distance. Matter of Clement, (1910) 69 Misc. 181, 124 N. Y. S. 1039.

Necessity of renewal of consents after suspension of traffic.— Where traffic in liquors was carried on at certain premises on March 23, 1896, the fact that electors voted for suspension of the traffic for two years, did not require that consents of the owners of neighboring dwellings should be secured for a resumption of traffic, when the electors again permitted the traffic in the town. People v. Brush, (1904) 179 N. Y. 93, 71 N. E. 731, affirming 92 App. Div. 611, 86 N. Y. S. 1144, affirming 41 Misc. 56, 83 N. Y. S. 607. The court said at page 96: "A careful reading of the statute will show that the word 'continuously' applies only to places where consents are necessary, and does not refer to places where the business was being carried on when the act was passed and so we have held. (Matter of Hawkins, 165 N. Y. 188; Matter of Loper, 165 N. Y. 618; Matter of Moulton, 168 N. Y. 645; Matter of Kessler, 163 N. Y. 205.) These cases all hold that the right to a liquor tax certificate without consents is a privilege in the nature of a property right that attaches

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to places where the traffic was carried on at the time the present law was enacted and that it is not lost or extinguished by a temporary suspension of the business, nor unless by some unequivocal act the owner abandons the right and changes the use of the property. The privilege cannot be extinguished by the vote of the electors of the town under the local option feature of the law. Such a vote has no other effect than to suspend the traffic entirely in the town as to all places during the time specified in the statute, and when the electors reverse their determination at a subsequent town meeting all rights suspended are revived and are in force as completely as if the prior decision had not been made."

The contrary was held in Matter of Klevesahl, (1900) 30 Misc. 361, 63 N. Y. S. 741.

As to the necessity of consents for traffic in premises, after revocation of the certificate therefor, see, infra, § 23, subd. 3.

As to necessity of renewal of consents after abandonment of traffic, see infra, this note and section, subd. 3, *Exemption in Favor of Certain Premises.*

Opinion of deputy commissioner of excise as to sufficiency of consents.—The fact that a deputy commissioner of excise had advised that a certain building should be considered as two dwellings on the question of the necessary consents, does not estop the commissioner of excise from bringing a proceeding for the revocation of the certificate on the ground that the necessary consents had not been filed. Matter of Clement, (1906) 101 N. Y. S. 447.

3. Exemption in Favor of Certain Premises

What constitutes a hotel: see, infra, § 30, subd. N.

Extension of hotel exemption to adjoining buildings.—One conducting a hotel, which had been occupied as such since before March 23, 1896, cannot extend the privilege of traffic without the consent of nearby owners of dwellings by purchasing a building across an alley from the hotel and then by connecting the two. If he seeks to traffic in the building across the alley, he must procure the consent of the required number of owners within the prescribed distance. Matter of Haight, (1901) 33 Misc. 544, 68 N. Y. S. 920, affirmed 59 App. Div. 626, 69 N. Y. S. 1136.

Abandonment of traffic.—An actual abandonment of traffic in liquors at a place where liquors were legally sold on March 23, 1896, constitutes a waiver of the exemption allowed by this section; and consents must be procured when it is sought to resume traffic at the premises. Matter of Grindrod, (1915) 91 Misc. 441, 154 N. Y. S. 929; Matter of Ritchie, (1896) 18 Misc. 341, 40 N. Y. S. 1106; People v. Lammerts, (1896) 18 Misc. 343, 40 N. Y. S. 1107, affirmed 14 App. Div. 628, 43 N. Y. S 1161, affirmed (1900) 162 N. Y. 595; Matter of Lyman, (1898) 1 Liq. Tax Law Rep. 390; Matter of Weigle, (1903) 3 Liq. Tax Law Rep. 277.

"This privilege conferred by the statute, which secures to the property owner a right to a license without consents, may nevertheless be lost or abandoned by the intentional act of the owner of the property. . . . Provided the abandonment actually takes place, it is a matter of little consequence whether the abandonment is for a short or a long time, but there must be an abandonment. The fact that for a considerable period the property is not used for the sale of liquor has great probative force of an intention to abandon; but that circumstance is subject to explanation, and mere lapse of time is not conclusive against the owner." Matter of Clement, (1907) 52 Misc. 325, 102 N. Y. S. 178. Where the occupant of premises abandoned traffic therein a few weeks after the Liquor Tax Law went into effect, for a period of over two months, a certificate cannot be issued without the consent of two-thirds of the owners of dwellings within the prescribed distance. Matter of Ritchie, (1896) 18 Misc. 341, 40 N. Y. S. 1106. An abandonment

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for a period as short as four days was held sufficient to constitute a waiver of the exemption. People v. Lammerts, (1896) 18 Misc. 343, 40 N. Y. S. 1107, affirmed 14 App. Div. 628, 43 N. Y. S 1161, affirmed (1900) 162 N. Y. 595. When the business has been abandoned for a considerable time, it cannot be renewed without obtaining the requisite consents; and it is immaterial that when the owner built a new building on the lot, he constructed it so that he could sell liquors therein if he desired. Matter of Weigle, (1903) 3 Liq. Tax Law Rep. 277. While a brief interruption, such as for a domestic bereavement, might be disregarded on the question whether premises had been continuously occupied for the liquor traffic, if they have been closed for over twelve months while the owner is looking for a purchaser, they cannot be said to be occupied for the traffic in liquors. Matter of Lyman, (1898) 1 Liq. Tax Law Rep. 390. And see, infra, section 23, as to cognate restrictions against traffic near churches and schoolhouses.

As to necessity of renewal of consents on resumption of traffic after involuntary suspension by local option election, see supra, this note and division, subd. 2, *Necessity of Consents.*

Injury by fire.— Where a suspension of liquor traffic in certain premises is caused entirely to the fact that the place has been partially or wholly destroyed by fire, and the certificate holder intends to resume the traffic as soon as the building is in proper condition for that purpose, there is not an abandonment of traffic at the premises, so as to require the consent of owners within the prescribed distance. Matter of Kessler, (1900) 163 N. Y. 205, 57 N. E. 402, wherein it was said: "The provision of the statute which secures the right to a license for a place where the business is conducted at the time of the passage of the law, does not require that the traffic should be continuous under any and all circumstances. The plain purpose of the law was, that when the business in such places has been once abandoned, it should not be resumed except with the consent of the residents as pointed out in the statute. A temporary suspension of the traffic, resulting from an accident such as the destruction of the building by fire, or the like, will not operate to affect the right attached to the premises under the law. A suspension of the traffic on Sunday is enjoined by the statute itself, and so in regard to the day of a general election, and possibly some other days, but where a party is in possession of premises to which the privilege conferred by the statute has attached and he is compelled to suspend business temporarily, by reason of an accidental fire, and then resumes in good faith when the necessary repairs required by the fire have been made, it can properly be said that the traffic has been continuously conducted in the place since the passage of the law. In order to deprive the place of the privilege conferred by the statute it must appear that there was a real and substantial abandonment of the business by the occupant; and when that is shown it will terminate the privilege, even though the suspension should be for but a brief period. But where the occupant is compelled to suspend for a brief period by stress of circumstances, or from an accident, such as appears in this case, the right will not be lost, providing the business is resumed at the first reasonable opportunity."

Traffic on premises is not abandoned so that the consent of nearby owners is required, where the building has been destroyed by fire, though another building is not placed on the land for over two years, if it appears that the owners did not intend to abandon the traffic but intended to open a hotel on the site as soon as they could make financial arrangements. Matter of Clement, (1907) 52 Misc. 325, 102 N. Y. S. 178.

Abandonment by tenant.— An abandonment by a tenant of traffic in liquors, made against the express agreement of the tenant and concealed from the owner of premises, will not require the owners to secure the required consents of nearby owners for an application made a few weeks later. Matter of Loper, (1900) 53 App. Div. 576, 66 N. Y. S. 13, affirmed (1900) 165 N. Y. 618, 59 N. E. 1125.

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Abandonment of hotel.— The exemption in favor of a hotel occupied as such on March 23, 1916, may be lost by the abandonment of the use of the building as a hotel, so that the proprietor will be required to procure the consents of two-thirds of the owners within the prescribed distance when he desires to resume the traffic in liquor at the premises. Matter of Brewster, (1903) 85 App. Div. 235, 83 N. Y. S. 564; Matter of Bridge, (1898) 25 Misc. 213, 55 N. Y. S. 54, affirmed on opinion below 36 App. Div. 533, 55 N. Y. S. 54. And the exemption is not lost where the building is destroyed by fire, if it is rebuilt within a reasonable time. Matter of Pierson, (1900) 32 Misc. 293, 66 N. Y. S. 546. But where premises were occupied as a hotel on March 23, 1896, the proprietor is not required to procure the consent of the owners within the prescribed distance, though for a period subsequent to 1896 the traffic in liquors was abandoned at the premises; and the mere fact that these premises were without a tenant during a period of several months evidences no intention on the part of the owners to abandon the premises for use as a hotel. Matter of Moulton, (1901) 59 App. Div. 25, 69, N. Y. S. 14, affirmed on opinion below (1901) 168 N. Y. 645, 61 N. E. 1131.

4. Exemptions Where Consents Have Been Filed

Retroactive effect of amendment permitting consents to remain in force.— As originally enacted in the Liquor Tax Law of 1896, subdivision 8 did not continue in force the consents which were once filed, but new consents were required with each application. In 1897, it was amended to read in substance the same as now, but it was held that the amendment was not retroactive and did not apply to consents already filed at the time the amendment went into force. Matter of MacVicker, (1897) 21 Misc. 383, 47 N. Y. S. 1008.

Validity of prior consents.— Where a liquor tax certificate for certain premises has been procured under circumstances requiring the consent of two-thirds of the owners within the prescribed distance, the right of a subsequent applicant for traffic at such premises will generally depend upon the validity and sufficiency of the consents filed by his predecessor. Matter of Bullard, (1906) 113 App. Div. 159, 98 N. Y. S. 1011.

Absence of any consent.— Under the last sentence of subdivision 8, a certificate may be revoked where no consent has been procured, though the petitioner is a competitor of the certificate holder and is seeking to destroy the business of his rival; but in such a case the revocation may be without costs. Matter of Grindrod, (1915) 91 Misc. 441, 154 N. Y. S. 929.

Consents kept in force by continuous traffic.— "The consents having been obtained and filed are kept in force so long as the place shall be continuously occupied for traffic." Farley v. Miller, (1916) 216 N. Y. 449, 111 N. E. 66.

"Continuously occupied."— Premises are not "continuously occupied" for the traffic in liquor when they are not so used for a period of a year and eight months, and during several months of that period were used as a dry-goods store with the knowledge of the owner and with her acquiescence, though the abandonment was by a tenant. Matter of Grindrod, (1915) 91 Misc 444, 154 N. Y. S. 929. The consent of an owner to an abandonment of premises so that consent of property owners is required, is necessary only when the traffic in liquors was carried on at the premises on March 23, 1896, or where the premises on that date were occupied as hotel; under the third exception, an abandonment of the traffic by a tenant may require the consent of property owners for a resumption. Matter of Grindrod, (1915) 91 Misc. 441, 154 N. Y. S. 929.

5. Power to Execute Consent

Who is "owner" under statute providing for consent or remonstrance of property owners to issuance of liquor license: see 16 Ann. Cas. 1229 note. *Person who becomes qualified freeholder for sole purpose of petitioning for*

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or consenting to issuance of liquor license as bona fide freeholder within statute: see 16 Ann. Cas. 276 note. *Power of infant to consent to issuance of liquor license:* see Ann. Cas. 1916C 497 note.

In general.— The owner of land is commonly understood to be the person who has the legal title thereto, and not one who simply for the time being has the possession thereof; and, if the legislature had intended a meaning for the term "owner" as used in subdivision 8, different from the ordinary accepted meaning thereof, apt words would have been used to denote the qualification of such meaning. Matter of Sherry, (1898) 25 Misc. 361, 55 N. Y. S. 421.

One of joint owners.— The consent of one of two or more joint owners of a dwelling, is not sufficient. Matter of Ireland, (1903) 41 Misc. 425, 84 N. Y. S. 1100.

Husband and wife.—A husband cannot, without the consent or authority of his wife, execute a consent for premises owned by her. Matter of Bullard, (1906) 113 App. Div. 159, 98 N. Y. S. 1011. Where property is owned by a husband and wife as tenants by the entirety, the consent of the husband alone is not sufficient under subdivision 8, but the wife must also execute the consent in order to make it sufficient. Matter of Quigley, (1907) 56 Misc. 110, 106 N. Y. S. 167. And see Matter of Flanagan, (1899) 2 Liq. Tax Law Rep. 140, holding that a consent signed by the wife only should be sustained by better evidence than a verbal statement that the husband had shortly prior to the filing of the application conveyed his interest in the property to his wife. Matter of Flanagan, (1899) 2 Liq. Tax Law Rep. 140.

Executor.— One who is an executor of a will having a power of sale and is one of several devisees of property given by the will, cannot execute a legal consent for the issuance of a liquor certificate within the prescribed distance. Matter of McCoy, (1905) 104 App. Div. 215, 93 N. Y. S. 401.

Infant.— The infant owners of property within the prescribed distance of 300 feet cannot give a valid consent to the issuance of a liquor tax certificate. Matter of Farley, (1914) 213 N. Y. 15, 106 N. E. 756, Ann. Cas. 1916C 494, L. R. A. 1916D 816, reversing 161 App. Div. 63, 146 N. Y. S. 291.

Possessor under contract to purchase.— Persons who have possession of premises under contracts for the purchase thereof, though they do not have the legal title to the premises, are considered as owners within the meaning of subdivision 8 of this section and may execute the consents. Matter of Clement, (1908) 93 Misc. 563, 157 N. Y. S. 434. But see, Matter of Selig, (1903) 3 Liq. Tax Law Rep. 106, holding that one purchasing property under a contract is not an "owner" within the meaning of subdivision 6 of this section.

Lessee.—A leesee of premises is not an owner of the premises, and cannot execute a consent under this subdivision. Matter of Sherry, (1898) 25 Misc. 361, 55 N. Y. S. 421.

Life tenant.— The owner of the legal title to premises may execute the required consents, though another person has a life lease thereof. Matter of Clement, (1906) 101 N. Y. S. 447.

Agent.— The expression "duly authorized agent or agents of such owner or owners" includes only such agents as are duly authorized by the owner to sign the consent in his behalf; the mere fact that a person is agent for the owner, to rent the premises and to take such charge of them as an agent to rent generally has, is not sufficient to constitute him an agent duly authorized to sign the consent referred to in the statute. Matter of McCoy, (1905) 104 App. Div. 215, 93 N. Y. S. 401.

One who is not expressly authorized to sign the consent prescribed in subdivision 8, though he is a lessee of the premises and represents the owner as a general real estate owner and is interested in any profits that might be realized upon a sale of the property, cannot execute a valid consent. Matter of Rupp, (1907) 54 Misc. 1, 105 N. Y. S. 467.

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6, *What Buidings within Distance are Considered*

In general.—"Buildings displaying evidence of active trade, even if lived in, are not exclusively occupied for dwellings; and are not to be counted to ascertain if the owners of the surrounding homes assent to the proposed application." Matter of Bennett, (1912) 76 Mis. 310, 136 N. Y. S. 910. And see Matter of Lyman, (1899) 26 Misc. 568, 57 N. Y. S. 488, wherein it was said: "It seems to me the provision of the statute in question means a building, all of which, considered as a whole, in its general and preponderating use, is designed for and devoted to occupation as a dwelling, as a dwelling of its kind would ordinarily be used, and to the exclusion of any distinct portion thereof being openly and habitually devoted to some other purpose, as that of business." A building used mainly as a grocery store is not considered on the question of consents. Matter of Ruland, (1897) 21 Misc. 504, 47 N. Y. S. 561.

Premises to be devoted to the traffic.— The consent of the owner of the premises for traffic in which the application is made, will not avail the applicant, though previous to the application the building was occupied exclusively as a dwelling. Matter of Flanagan, (1899) 2 Liq. Tax Law Rep. 140.

Use of dwelling by physician as an office.— In Matter of Bullard, (1906) 113 App. Div. 159, 98 N. Y. S. 1011, it was thought, but the point was not definitely decided, that a dwelling occupied by a physician was within the statute and should be considered on the question of consents though he had his sign on the outside of the building and received his patients in the house. But in Matter of Russell, (1896) 1 Liq. Tax Law Rep. 103, it was held that a building used by a doctor as a residence and having rooms used particularly as an office, is not used exclusively as a dwelling, and need not be considered on the question of consents.

Boarders and roomers.— A dwelling does not become a business place such as is not considered on the question of consents, because the owner is in the habit of letting rooms by the week to persons who might apply for them. Matter of Veeder, (1900) 31 Misc. 569, 65 N. Y. S. 517. "To say that because a man, living with his wife and family, occupying a house not designated or indicated as a boarding house by any sign where boarders had never been solicited, but where the family had occasionally taken in a boarder, to say that such a house was not occupied exclusively as a dwelling, but was in fact a public boarding house, would be to strain the common understanding of what a boarding house is, beyond the limits of common sense." Matter of Ellis, (1904) 3 Liq. Tax Law Rep. 415.

Sewing and washing in dwelling.— The fact that the occupant of a dwelling does washing for others, does not take the premises out of consideration on the question of consents. Matter of Lyman, (1899) 26 Misc. 568, 57 N. Y. S. 488. But a building which has show windows and is used as a laundry every year during the summer months, though used as a residence during the balance of the year, is not used exclusively as a dwelling within the meaning of subdivision 8, though at the time of an application for a certificate, the premises are not used for laundry purposes. Matter of Bennett, (1912) 76 Misc. 310, 136 N. Y. S. 910. A house occupied by two dressmakers with a printed card or sign in the window, has been held to be not a building occupied exclusively for dwelling purposes. Matter of Herse, (1900) 2 Liq. Tax Law Rep. 256. But it has also been held that the fact that an occupant of premises is a dressmaker by trade, and does more or less sewing in the house, but has no sign out, does not make the premises partly used for business. Matter of Ruland, (1897) 21 Misc. 504, 47 N. Y. S. 561.

Unfinished houses.— Dwellings in the course of construction and not ready for immediate occupancy, are not considered in determining the number of consents; and consents of their owners will not aid the applicant to secure a

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certificate. Matter of Clement, (1908) 58 Misc. 638, 111 N. Y. S. 1073. And see to the same effect: Matter of Saunders, (1900) 2 Liq. Tax Law Rep. 262.

Vacant dwellings.— Dwellings in a neighborhood which is rapidly taking on the characteristics of a business section, which have long been vacant and are for sale, need not be considered in determining the number of consents required. Matter of Townsend, (1909) 195 N. Y. 214, 88 N. E. 41, 16 Ann. Cas. 921, 22 L. R. A. (N. S.) 194. But buildings which are constructed and intended for occupation as dwellings, are to be considered, though it happens that they are unoccupied at the time the application is made for a certificate. Matter of Ruland, (1897) 21 Misc. 504, 47 N. Y. S. 561.

Business part of building unoccupied.— For the purpose of determining whether a building shall be considered on the question of consents, it derives its character and designation from the usual and ordinary purposes for which it is used, not from a temporary purpose to which it is put at the time the application is made. Hence, a building with store on one floor and living rooms on the second floor, is not used exclusively as a dwelling within the meaning of the statute, though at the time the application is made the store section is unoccupied. Matter of Johnston, (1897) 1 Liq. Tax Law Rep. 167.

Rendezvous for persons of questionable character.— A building which is used as a public resort or a rendezvous for persons of questionable character, is not to be considered on the question of consents. Matter of Jenny, (1897) 1 Liq. Tax Law Rep. 196.

Outbuilding connected with main building.— An outhouse which is connected with the main dwelling and adapted for use in connection therewith and built for that purpose, and which is not used as a dwelling or capable of use as such, is not a dwelling within the meaning of subdivision 8 of this section. Matter of Holmes, (1899) 2 Liq. Tax Law Rep. 187.

Addition to business block. —An addition to a business structure, such addition being used solely as a dwelling, and there being no communication from the addition to the old part, and the two parts having separate street numbers, is to be treated as a separate dwelling on the question of consents. Matter of Lyman, (1899) 26 Misc. 568, 57 N. Y. S. 488.

Alteration of dwelling.— A building which has been used as a dwelling must be considered on the question of consents, where the owner testifies that he intends to use it as a dwelling, though it appears that he is making large additions and alterations to the building and has made declarations that he intended to use it as a hotel. Matter of Aldous, (1896) 1 Liq. Tax Law Rep. 85.

Effect of signs on buildings.— Where signs were placed on dwellings with the words "E. Fenton, Disinfectants," and "Mrs. Hennin, Dressmaking," and it appeared that the placing of such signs was caused to be done by the certificate holder for the purpose of creating the false impression that the buildings were not occupied exclusively as dwellings to the end that he could procure a certificate without including those buildings among the number within the prescribed distance, the certificate issued without consideration of such buildings was revoked. Matter of Rasquin, (1902) 37 Misc. 693, 76 N. Y. S. 404.

Buildings erected to procure or defeat certificate.— A dwelling erected for the avowed purpose of defeating an application for a certificate, must nevertheless be counted, where it is actually used as a dwelling. Matter of Ryon, (1903) 39 Misc. 698, 80 N. Y. S. 1114, affirmed 85 App. Div. 621, 83 N. Y. S. 123. "It is not the size or the material of which a building is constructed, but the purpose to which it is devoted that is the controlling factor under this statute. A dwelling may be humble and inexpensive, yet as much a domicile as a mansion." Matter of Lyman, (1998) 24 Misc. 552, 53 N. Y. S. 577. A small building of rough boards, not lathed or plastered, located in the rear of premises for which an application is made,

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and not occupied until the evening before the application, and another small building of rough boards built at that time and first occupied that night, both buildings complete costing about $35, are not to be considered as dwellings. Matter of Lyman, (1898) 24 Misc. 552, 53 N. Y. S. 577. Where, to secure the requisite number of consents for traffic in a saloon in a residential section, the applicant erects on the saloon lands a frame building set on posts with no foundation and divides the same into seven sections about eight feet wide, the total cost of the seven sections being $1185, such structure will not be counted as seven dwellings. Matter of Patterson, (1904) 43 Misc. 498, 89 N. Y. S. 437. A building containing but one room, costing but $35, and hurriedly moved to its location for the express purpose of defeating an application for a certificate and not made habitable until after its issuance, is not one entitled to protection under the terms of this section. Matter of Vail, (1902) 38 Misc. 392, 77 N. Y. S. 903.

Double house.—A double building under one roof and on one foundation, though containing separate apartments for different families and adapted to the use of two families, is one dwelling, not two dwellings, within the meaning of subdivision 8. Matter of Clement, (1907) 118 App. Div. 575, 103 N. Y. S. 157, wherein it was said: "It is the number of buildings which control, not the number of residents or the number of families, or the number of owners of the buildings. It is undoubtedly true that buildings, although connected and built together, may still retain their separate and individual characteristics, and be separate buildings within the meaning of this provision of the Liquor Tax Law."

In determining the sufficiency of consents, a structure originally constructed as one building on one continuing wall, with no solid division in the structure, is to be considered as one dwelling, though a flimsy partition has been subsequently put in the cellar and it is used as double house. Matter of Clement, (1906) 101 N. Y. S. 447. A brick building with no interior partition carried up from the cellar to roof dividing an entire portion of the block from another, is to be counted as one building though it is divided into six apartments on three different floors and occupied by six different families. Matter of Adriance, (1900) 2 Liq. Tax Law Rep. 408. Where the first floor of a two story building is occupied by two stores, one a meat market and the other to sell liquor, and the upper or second floor is used for two complete sets of living rooms and each occupied by a family as a dwelling place, the owner cannot convey the second story to a third person so as to constitute two separate dwelling houses thereof; but the entire building is to be considered as an entirety and need not be counted on the question of consent. Matter of Smith, (1905) 3 Liq. Tax Law Rep. 573. On the other hand, where there are two or more distinct buildings occupied by distinct families and embraced within one building, no part of which is used for any other purpose, each distinct dwelling, although it is under a common roof with others, constitutes one building occupied exclusively as a dwelling within the statute. Matter of Herse, (1900) 2 Liq. Tax Law Rep. 256. And see Matter of Patterson, (1904) 43 Misc. 498, 89 N. Y. S. 437; Matter of Smith, (1905) 3 Liq. Tax Law Rep. 573, to the effect that double houses may be counted as two dwellings. In Matter of Patterson, (1904) 43 Misc. 498, 89 N. Y. S. 437, it was held that one half of a double house may be considered as a separate dwelling for the purpose of obtaining consents necessary for traffic in the other half.

7. *Manner of Measurement*

"Nearest entrance" defined.—The nearest entrance to a building occupied exclusively as a dwelling is the nearest entrance, whether the rear, side or front, to said dwelling, measured in a straight line, from the nearest public entrance to the building in which traffic in liquors is supposed to be carried

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on. The nearest entrance to a building in which traffic in liquors is to be carried on, under the statute, is any entrance to which the public may enter the building as patrons of the business carried on therein. Matter of Herse, (1900) 2 Liq. Tax Law Rep. 256. The "nearest entrance" includes all entrances, front, side or rear. Matter of McMonagle, (1903) 41 Misc. 407, 84 N. Y. S. 1068. It is not necessarily the entrance to the bar or barroom, but is the nearest entrance to the building through which access may be had to the bar or barroom. Matter of McMonagle, (1903) 41 Misc. 407, 84 N. Y. S. 1068.

Rear doors.— The circumstance that the statute qualifies the term "entrance" by the adjective "nearest" indicates that the legislature had in mind more than one entrance to dwellings and meant to include rear and side entrances as well as front entrances; and, therefore, a rear entrance approachable through the yard from the street is an "entrance" within the meaning of the statute. Matter of Saunderson, (1901) 34 Misc. 375, 69 N. Y. S. 928. A rear entrance by which the barroom can be reached after a walk of ten feet through the hall is an "entrance," and if that entrance is within three hundred feet of the nearest entrance to a building occupied exclusively as a dwelling, such dwelling must be considered on the question of consents. Matter of McMonagle, (1903) 41 Misc. 407, 84 N. Y. S. 1068.

But a rear door of a dwelling which opens into a back yard to which there is no access from the street, is not an "entrance" within the meaning of subdivision 8, and such dwelling need not be considered on the question of consents. McDougal v. Malaghan, (1906) 184 N. Y. 253, 77 N. E. 12, wherein is was said: "We think that the statute contemplates a doorway or passageway which might be used by any person outside the dwelling desiring to enter the same. It is, of course, not necessary that this entrance should be upon the front of the building. It may be upon the side or the rear, but still it should be a means of ingress accessible to anybody desiring to pass from the street or other point outside of the dwelling into the latter."

Rear building on lot.— Where a rear building is reached through an independent hallway leading from the street through the front building to the yard between the front and rear buildings, the "entrance" referred to in the statute is the door or physical opening leading from the yard into the rear building, not the entrance from the street into the hallway in the front building. Matter of Rupp, (1907) 54 Misc. 1, 105, N. Y. S. 467.

Entrance to saloon on second story of building.— Where it is sought to establish a saloon in a room on the second story of a building, the entrance to such building, on the question of consents, is the entrance from the street into the hallway, not the entrance at the top of the hall leading into the barroom. Matter of Underhill, (1896) 17 Misc. 19, 39 N. Y. S. 575.

Entrance to park.— Where an applicant proposes to traffic in liquors in a park, the "entrance" from which measurements are to be taken, is not the entrance to the park grounds but to the building where the liquors are to be sold. Matter of Keene, (1896) 1 Liq. Tax Rep. 79.

Door in recess.— Where the door of certain premises is a foot inside of the opening in the wall, the measurement is to be taken to the opening in the wall, not to the actual door. Matter of Lyman, (1898) 24 Misc. 552, 53 N. Y. S. 577. The entrance to which the distance is to be computed, is the opening into the wall of the building, not a door set back from the wall in the entrance way. Matter of Cheney, (1901) 35 Misc. 598, 72 N. Y. S. 134.

Closed entrance.—A doorway which has been permanently closed is not an "entrance" within the meaning of subdivision 8. Matter of Purdy, (1899) 40 App. Div. 133, 57 N. Y. S. 629. But measurements should be taken from an entrance which is barred in such a manner that the bars can be removed in a moment. Matter of Ball, (1902) 3 Liq. Tax Law Rep. 50 The taking of knobs from a door and nailing it up with tenpenny nails, does not deprive

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it of its character as an entrance. Matter of Johnston, (1897) 1 Liq. Tax Law Rep. 167, wherein it was said: Any method of closing entrances which can by slight effort and without general observation, be changed, would throw upon the authorities charged with the enforcement of this law the duty of constant surveillance of each licensed place having such a 'closed' entrance. This would be subversive of the letter as well as the spirit of the law." Matter of Johnston, (1897) 1 Liq. Tax Law Rep. 167.

Entrance cut to affect application.— A new entrance cut by the applicant in a building on the day the application for the certificate was made, for the purpose of affecting the right of the applicant to his certificate, will not be considered in determining his rights to the certificate. Matter of Cheney, (1901) 35 Misc. 598, 72 N. Y. S. 134.

Straight line.— The measurement of the three hundred feet is to be taken in a straight line, not the course which persons would travel in going from one building to the other. Matter of Johnston, (1897) 1 Liq. Tax Law Rep. 167. The line is to be regarded as running through all obstructions in the course. Matter of Bridge, (1898) 25 Misc. 213, 55 N. Y. S. 54, affirmed on opinion below 36 App. Div. 533, 55 N. Y. S. 54; Matter of Ruland, (1897) 21 Misc. 504, 47 N. Y. S. 561. Compare Matter of Underhill, (1896) 17 Misc. 10, 39 N. Y. S. 575, holding that the measurement should be taken by going around obstructions in a practical manner.

8. Form of Consents

Signing.— Subdivision 8 contemplates that the consents shall be executed at the end thereof by the owners of property; and, where to make up the number required by the statute the names of two owners are written on a "rider" and affixed to an earlier application for the same premises and above the consenting clause, such consents are insufficient. Matter of Griffin, (1907) 56 Misc. 21, 106 N. Y. S. 24.

Acknowledgment.— Where the officer taking acknowledgments to consents is in fact a notary public, the circumstance that he has not filed his autograph signature in the office of the register as required by law, is an irregularity which does not invalidate the acknowledgments. Matter of Townsend, (1909) 195 N. Y. 214, 88 N. E. 41, 16 Ann. Cas. 921, 22 L. R. A. (N. S.) 194.

9. Duration and Revocation of Consents

Revocation for failure to attach consents: see infra, § 27, subd. 2.

Term.— The statute recognizes a consent which specifies no term, for the failure to state a term imports a consent to an unlimited term. Matter of VanVleck, (1900) 2 Liq. Tax Law Rep. 263.

Death of person consenting.— Where a person executing a consent under this section dies before the application is presented to the certificate issuing officer, the consent is deemed to be revoked. Matter of Ireland, (1903) 41 Misc. 425, 84 N. Y. S. 1100.

Revocation of consent.— Between the time of the execution of a consent given under subdivision 8 without consideration and the time such consent is presented to the certificate issuing officer with the application, the person signing such consent may revoke the same, and such consent cannot be counted; and this is true though the applicant in reliance upon the consent has spent a considerable sum of money in making the premises suitable for the liquor traffic. Matter of Adriance, (1901) 59 App. Div. 440, 69 N. Y. S. 314. See also Matter of Adriance, (1900) 2 Liq. Tax Law Rep. 408.

But a revocation filed with the county treasurer a few minutes after the application is made to him for the issuance of the certificate, though before the certificate is actually delivered to the holder, is too late, and the certificate will not be revoked on that ground. Matter of White, (1903) 3 Liq. Tax Law Rep. 147.

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The fact that the consent of property owners has been revoked before the issuance of the certificate does not excuse the county treasurer from issuing the certificate; if the papers are in proper form, the certificate must be issued, though it is subject to cancellation in a proceeding brought under section 27. People v. Coonley, (1901) 2 Liq. Tax Law Rep. 607.

IV. Proof of Issuance of Certificate

Parol evidence.— Subdivision 11 of this section does not preclude oral evidence of the issuance of a liquor tax certificate by a person who saw the certificate in the window of the premises. Cullinan v. Horan, (1907) 116 App. Div. 711, 102 N. Y. S. 132.

§ 16. Bonds to be given. Each person taxed under this chapter, shall, at the time of making the application provided for in section fifteen of this chapter, file in the office of the county treasurer of the county in which such traffic is to be carried on, or in the office of the special deputy commissioner of excise, if there be one, or if the application be under subdivision four of section eight of this chapter, with the state commissioner of excise, a bond to the people of the state of New York, in the penal sum of the amount plus one-fifth of the tax for one year upon the kind of traffic in liquor to be carried on by such applicant, where carried on, but in no case for less than five hundred dollars, conditioned that there is no material false statement in the application statement for such liquor tax certificate, and that if the liquor tax certificate applied for is given, the applicant or applicants will not, while the business for which such liquor tax certificate is given shall be carried on, suffer or permit any gambling in the place designated by the liquor tax certificate in which the traffic in liquors is to be carried on, or in any yard, booth, garden or any other place appertaining thereto or connected therewith, or suffer, permit or have any opening or means of entrance or passageway for persons or things between the room where the traffic in liquors is carried on, and any other room or place where any person whosoever suffers or permits any gambling, or suffer or permit such premises to become disorderly, or suffer, permit or have any opening or means of entrance or passageway for persons or things between the room or place where the traffic in liquors is carried on, and any other room or place which any person whosoever suffers or permits to become disorderly, and will not violate any of the provisions of this chapter or any act amendatory thereof or supplemental thereto; and that all fines and

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penalties which shall accrue during the time the certificate applied for is held, and any judgment or judgments recovered therefor, will be paid, together with all costs taxed or allowed in any action or proceeding brought or instituted under the provisions of this chapter. Such bond shall be executed by each such applicant, and if given by a corporation or association, by some person or persons duly authorized so to do as principal, and by at least two sureties who shall be freeholders severally owning within the county, city or borough where the traffic in liquors is to be carried on, under the certificate applied for, unencumbered real estate of the value of not less than the penalty of the bond and who shall be residents of the county, city or borough in which the premises are where such traffic is to be carried on, or instead of such sureties, by a corporation duly authorized to issue surety bonds by the laws of this state and approved by the state commissioner of excise, but the state commissioner shall not withhold such approval except in the case of a corporation which is of questionable solvency or which has defaulted in the payment for more than thirty days after notice of entry of a judgment recovered by the state commissioner of excise under this chapter. The bond, if given by two sureties, shall have annexed thereto or indorsed thereon the affidavit of each surety that he is not engaged in the traffic in liquors nor employed in the conduct of such business, that he is a freeholder and that he owns unencumbered real estate situate in the county, city or borough where the traffic in liquors is to be carried on under the certificate applied for, of the value of not less than the penalty of the bond, the location of which shall be described in said affidavit, and if in a city or village the street and number given, and that he is worth double the penal sum named in such bond over and above his property exempt by law from levy and sale upon an execution and over and above his just debts and liabilities. The applicant may file in lieu of either of the other sureties herein provided a certificate of deposit for an amount equal to the penalty of said bond plus two hundred dollars. Said certificate to have been issued by an institution authorized by the state comptroller as a depository of state funds. Such certificate shall be drawn to the order of the applicant and be indorsed by him to the state commissioner of excise and the said sum so deposited as shown by said certificate shall at all times be applicable in payment of any judgment recovered by the state commissioner of excise upon said bond. If after the satisfaction

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of said judgment, there shall remain any surplus out of said deposit, the said surplus shall be at once returned by the state excise commissioner to the said applicant. The state commissioner of excise may at any time without previous prosecution or conviction for violation of any provisions of this chapter, or for the breach of any condition of said bond, commence and maintain an action, in his name, as such commissioner, in any court of record in any county of the state, for the recovery of the penalty for the breach of any condition of any bond or for any penalty or penalties incurred or imposed for a violation of this chapter, provided, however, that such action must be commenced within nine months after the cause of action has accrued. Should the surety given upon such bond be that of a certificate of deposit as above provided, demand may be made nine months or more after the expiration of the certificate granted upon the application which was accompanied by said bond, by the principal of said bond or his assignee of said certificate of deposit, for the surrender by the state excise commissioner of said certificate of deposit. Said certificate shall be surrendered within ninety days after such demand, unless an action for the recovery of the penalties provided for in said bond shall have been begun. All moneys recovered in such actions shall be paid over and accounted for in the same manner as are moneys collected under subdivision four of section eight of this chapter, but no recovery shall be had in any action commenced hereafter on any bond filed and approved by the certificate issuing officer subsequent to April second, nineteen hundred and three, for more than the amount, plus one-fifth of the tax for one year at the place for which the bond in suit was given, provided that no recovery on any such bond shall be for less than five hundred dollars.

This section was derived from the Liquor Tax Law of 1896, § 18, as amended by L. 1897, ch. 312, § 11; L. 1903, ch. 486, § 9, and L. 1908, ch. 350, § 4. It was amended to read as above by L. 1910, ch. 484, § 1; L. 1911, ch. 223, § 1, and L. 1916, ch. 416, § 6. The amendment by L. 1910, added the fourth, fifth, sixth and seventh sentences; changed the limitation for the commencement of an action in the eighth sentence from three years to two years, and added the ninth and tenth sentences. The amendment by L. 1911, changed the time for the limitation for the commencement of an action in the eighth sentence from two years to nine months; changed the time for making a demand in the ninth sentence from eighteen to nine months. In the ninth sentence the words "certificate granted upon the application which was accompanied by said bond" were substituted for the words "license for which said bond was given." The amendment by L. 1915 changed the words "one-half" in the first sentence and the last sentence to "one-fifth."

Section 16 of the Liquor Tax Law of 1896 is now covered by section 13.

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I. In General

When liability on liquor dealer's bond is exhausted: see 43 L. R. A. (N. S.) 76 note.

Power of legislature.— "The legislature, having control of the traffic in liquor, had the undoubted right by means of the requirements for such a bond, in addition to other civil and criminal penalties prescribed for violations of laws regulating this subject, to secure observation of such laws and to discourage, repress and punish any abuses, evasions and violations which persons might be tempted to attempt. It had the undoubted right to prescribe the terms and conditions under which the individual defendant might traffic in liquor as a pharmacist. If, as one of those conditions, he and his surety have executed a bond which upon a fair construction of its terms makes them liable for the unlawful act of an employee even though transgressing specific instructions, there is no reason why they must not submit to such result." Cullinan v. Burkard, (1904) 93 App. Div. 31, 86 N. Y. S. 1003.

Purpose of requirement of bond.— The purpose of the requirement of the bond is to secure on the part of the principal, not only the observance of the Liquor Tax Law and its special mandates, but also good behavior in other particulars essential to the orderly and proper conduct of the business. Lyman v. Shenandoah Social Club, (1899) 39 App. Div. 459, 57 N. Y. S. 372.

Statute a part of bond.— Where a bond is given in pursuance of a statute, the statute constitutes a part of the contract of the surety. Lyman v. Rochester Title Ins. Co., (1899) 37 App. Div. 234, 55 N. Y. S. 770.

Conformity to statute.— A strict and technical conformity to the statute is not essential to the validity of the bond. If it conforms substantially to the form prescribed it is sufficient. Thus the fact that the bond is, not only for violations of the Liquor Tax Law, but also for "any act amendatory thereof or supplementary thereto," does not affect the validity of the bond, for the quoted words may be construed to refer to amendments in force at the time of the execution of the bond. Lyman v. Brucker, (1899) 26 Misc. 594, 56 N. Y. S. 767.

Reformation of bond.— Where an undertaking securing compliance with the Liquor Tax Law was executed and delivered in blank to take the place of a prior undertaking which had been lost, with an understanding that the person to whom it was delivered should fill out the blanks so as to limit the liability of the guarantor to a specific sum, but without fraud and by pure mistake the blank was filled in so as to increase the liability, either party may have the instrument reformed to express the actual agreement. Bindseil v. Federal Union Surety Co., (1909) 130 App. Div. 775, 115 N. Y. S. 447.

Several liability of defendants.— The liability of the certificate holder and the surety under this section is several, and is not necessarily the same. Lyman v. Fidelity, etc., Co., (1901) 65 App. Div. 27, 72 N. Y. S. 498.

Sufficiency of sureties.— The duty and responsibility of passing upon the sufficiency of the sureties to a proposed bond under this section, is placed by the law in the first instance upon the certificate issuing officer; and his determination thereon should not be overruled by the court, unless it appears that his rejection of the sureties was unreasonable or capricious. Matter of Frey, (1904) 3 Liq. Tax Law Rep. 306.

Financial statements of surety companies.— Under section 86 of the Insurance Law, financial statements of surety companies uniting in liquor tax

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bonds should carry as unearned premium reserve for such bonds, 75 per cent of the premium receipts, where such bonds have been in existence three months. Op. Atty.-Gen. (1908) 453.

Recovery from surety of deposit made by applicant to secure surety.— Where an applicant for a liquor tax certificate secures his bond from a surety company and deposits with such company a sum of money to indemnify the surety company against loss on the bond, the company is not entitled to hold such money after the expiration of the certificate until the bond is cancelled or until all possible liability thereon is barred by the statute of limitations. Shea v. Fidelity, etc., Co., (1903) 83 App. Div. 305, 82 N. Y. S. 39, reversing 39 Misc. 107, 78 N. Y. S. 892.

Liability of undisclosed principal to surety.— Where the principal in a bond under this section was in reality merely an agent of a brewing company, a surety who without knowledge of such agency executes the bond and is compelled to pay a judgment in an action under this section because gambling was permitted on the premises, may maintain an action against the brewing company to recover the amount paid, since the latter, while benefiting by the suretyship, violated the conditions of the bond, the direct effect of which was to cause a loss to the surety company. City Trust, etc., Co. v. American Brewing Co., (1903) 174 N. Y. 486, 67 N. E. 62, affirming 70 App. Div. 511, 75 N. Y. S. 140. The extent of the liability of the surety company is the amount of the judgment, the costs incurred upon an unsuccessful appeal and the bona fide counsel fees and disbursements incurred by the surety in the defense of the case. City Trust, etc., Co. v. American Brewing Co., (1905) 182 N. Y. 285, 74 N. E. 948, reversing (1905) 88 App. Div. 383, 84 N. Y. S. 771, 93 App. Div. 606.

Proceeding by surety against certificate holder.— Where the commissioner of excise has procured a judgment on the bond against a certificate holder for a violation of the statute, and the judgment is assigned to the surety who pays the amount thereof to the commissioner, the surety may maintain supplementary proceedings against the principal, and an order for the examination of such principal will not be vacated because he claims that under his agreement with the surety he was not to be liable to the surety. Matter of White, (1907) 122 App. Div. 93, 106 N. Y. S. 738.

Cited.— Farley v. Dittmann, (1913) 155 App. Div. 363, 140 N. Y. S. 321, affirmed without opinion (1914) 213 N. Y. 659, 107 N. E. 1077; People v. Shults, (1914) 87 Misc. 348, 149 N. Y. S. 913, affirmed 166 App. Div. 868, 151 N. Y. S. 910. Op. Atty.-Gen. (1913) 532.

II. Nature of Action on Bond

Survival of cause of action on liquor dealer's bond after death of licensee: see 47 L. R. A. (N. S.) 183, note.

Action on contract.— An action on a bond under this section is an action upon a contract obligation and not one to recover a penalty or forfeiture imposed by statute. The bond amounts to a contract or agreement for the observance by the person licensed of the provisions of the Liquor Tax Law, and the sum named in the bond is fixed as the amount which in certain contingencies shall be paid as damages, which could not be fixed by any of those methods which commonly are applied to the determination of damages. Cullinan v. Burkard, (1904) 93 App. Div. 31, 86 N. Y. S. 1003. And see to the same effect, Lyman v. Shenandoah Social Club, (1899) 39 App. Div. 459, 57 N. Y. S. 372. An action on a bond under this section is not an action to recover a penalty or forfeiture imposed by statute, but is an action on a contract obligation imposed or assumed by the instrument. Lyman v. Gramercy Club, (1898) 28 App. Div. 30, 50 N. Y. S. 1004.

Different violations as constituting single cause of action.— A complaint in an action on a bond under this section states but a single cause of action

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though it alleges several different violations of the law sufficient to afford a cause of action. Lyman v. Broadway Garden Hotel, etc., Co., (1898) 33 App. Div. 130, 53 N. Y. S. 347; Lyman v. Plymouth Social Club, (1898) 1 Liq. Tax Law Rep. 365; Lyman v. Zimbrick, (1899) 1 Liq. Tax Law Rep. 441. But see Lyman v. Fidelity, etc., Co., (1898) 1 Liq. Tax Law Rep. 340, holding that each separate ground alleged in the complaint for basis of liability on the bond constitutes a separate cause of action.

III. Grounds of Action

Gambling in place where liquor traffic is carried on: see infra, § 21.

"Common gambler" defined: see Penal Law, § 970.

Seizure and destruction of gambling instruments: see Penal Law, §§ 977-979.

Gambling.— Even before the Liquor Tax Law prohibited gambling on the premises, the bond to be given under this section was conditioned against gambling on the premises; and an action could be maintained on the bond, if the certificate holder permitted gambling. Lyman v. Kurtz, (1901) 166 N. Y. 274, 59 N. E. 903.

A nickel slot machine with a revolving disk, so constructed that one placing a nickel therein would lose the nickel or win a greater sum from ten cents to a dollar, is a gambling device; and an action may be maintained on a bond if the holder of a certificate maintains such a device in his premises. Lyman v. Kurtz, (1901) 166 N. Y. 274, 59 N. E. 903. See also Lyman v. Brucker, (1899) 26 Misc. 594, 56 N. Y. S. 767. A special agent operating a slot machine in a saloon for the purpose of procuring evidence is not a gambler, and it is reversible error for the court so to charge. Clement v. Belanger, (1907) 120 App. Div. 662, 105 N. Y. S. 537.

Disorderly premises.— If a certificate holder permits the premises to become disorderly, the Commissioner of Excise may maintain an action against the surety on the bond covering the period of the certificate holder's violation. Lyman v. Coyle, (1899) 2 Liq. Tax Law Rep. 55.

The term "premises" in the statute refers to the premises on which the principal is authorized to traffic in liquors and the premises specified in the application; and, when the application and certificate is for traffic in a certain hotel, if the building with the possible exception of the barroom is used for immoral purposes, the bond is forfeited. Cullinan v. Fidelity, etc., Co., (1903) 84 App. Div. 292, 82 N. Y. S. 695, affirmed without opinion (1904) 177 N. Y. 574, 69 N. E. 1122.

In an action by the commissioner of excise to recover on a bond for permitting the premises to become disorderly, it is not necessary that the plaintiff show that the holder of the certificate had actual knowledge of or consented to the disorderly acts. Clement v. Federal Union Surety Co., (1907) 122 App. Div. 18, 106 N. Y. S. 1061, wherein it was said: "The condition of the bond was that the holder of the liquor tax certificate would not suffer or permit the premises to become disorderly. To avoid liability he undertook to perform an affirmative act which was to prevent the premises from becoming disorderly and was liable upon the bond if he failed in this undertaking. He could not by absenting himself from the premises and allowing those in charge to use the premises for disorderly purposes escape the consequences."

Sunday sale.— One illegal sale of liquor on Sunday is sufficient to authorize the commissioner to maintain an action on the bond. Cullinan v. Kisselbrack, (1904) 43 Misc. 103, 87 N. Y. S. 1025; Lyman v. Perlmutter, (1899) 2 Liq. Tax Law Rep. 56. See, infra, section 30, as to hours when sales are prohibited.

Sale to minor.— Under section 15 of the General Excise Law of 1857, a sale of liquors to a minor was prohibited, and for such a sale the commissioners

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of excise were given the power to maintain an action on the bond given by the licensee conditioned against disorderly conduct on his premises. People v. Eckman, (1892) 63 Hun 209, 18 N. Y. S. 654. See, *infra*, section 29, as to prohibited sales to minors.

Sale of Peruna by druggist.— In an action on the bond of a druggist for an unlawful sale of "Peruna," it is not reversible error to permit a witness for the plaintiff to testify as to the amount of alcohol contained in "Peruna" and also the amount in whisky, wines and lager beer; nor is it error to refuse to permit the defendant to show the percentage of alcohol in other preparations recognized as standard medicines by the United States Dispensatory. Clement v. Dwight, (1910) 137 App. Div. 389, 121 N. Y. S. 788. An action on a bond for an unlawful sale of "Peruna" by a druggist is an action on contract to recover damages for its breach, and the amount of damages is fixed and liquidated by the agreement; and the intent of the druggist in making the sale is, therefore, unimportant. Clement v. Dwight, (1910) 137 App. Div. 389, 121 N. Y. S. 788.

Sale by employee against instruction of certificate holder.— A sale of liquors in violation of the law by an employee of a certificate holder, though made in the absence of the holder and contrary to his specific instructions, renders the principal and surety liable on the bond. Cullinan v. Burkard, (1904) 93 App. Div. 31, 86 N. Y. S. 1003, reversing 41 Misc. 321, 84 N. Y. S. 825.

Necessity of prior conviction.— In case of the violation of the law by a certificate holder, a civil action may be maintained upon the bond to recover the penalty of the bond, before the institution of any criminal proceedings, and entirely independent of sections 36 or 39 of the Liquor Tax Law. Lyman v. Rochester Title Ins. Co., (1899) 37 App. Div. 234, 55 N. Y. S. 770.

Power of commissioner to determine whether action shall be brought.— "While the state commissioner of excise may determine at a given time whether sufficient grounds exist to warrant prosecuting an action upon the bond, that determination is not absolute, so as to bind either himself or his successor in office not to commence an action upon such a bond in the future." Clement v. Reavley, (1908) 126 App. Div. 215, 110 N. Y. S. 418.

Violations at other places.— An action on a bond given for traffic at certain premises cannot be maintained for a violation of the law at other premises maintained by the certificate holder. Clement v. Smith, (1908) 128 App. Div. 859, 113 N. Y. S. 55, affirmed (1909) 197 N. Y. 531 mem.

IV. Defenses

Effect on liability on liquor dealer's bond of his ignorance of purchaser's intoxication: see 25 L. R. A. (N. S.) 801, note.

Liquor bond as affected by invalidity of license: see 47 L. R. A. (N. S.) 1031, note.

Illegality of certificate.— If a certificate issuing officer issues a certificate without authority to do so, and the certificate is void *ab initio*, the bond is without consideration and no recovery can be had thereon. Farley v. O'Brien, (1915) 91 Misc. 89, 154 N. Y. S. 1021. Thus, a certificate issued for traffic on premises owned by the United States may be void, and there can be no recovery on the bond given by the certificate holder. Farley v. Scherno, (1913) 208 N. Y. 269, 101 N. E. 891, 47 L. R. A (N. S.) 1031, reversing 147 App. Div. 375, 132 N. Y. S. 170. And, where an application shows upon its face that the consent of two-thirds of the neighboring owners has not been secured, as required by section 15, if the county treasurer nevertheless issues a certificate to the applicant, it is void *ab initio*, and there can be no recovery on the bond for a false statement in the application. Farley v. Aprile, (1914) 86 Misc. 75, 148 N. Y. S. 275.

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The surety does not guarantee the truthfulness of the statements contained in an application for a certificate; and, if the applicant untruthfully states that he has not been convicted of a felony, the surety is not liable under the bond for the acts of the principal in selling liquor under the license, provided the surety had no knowledge of the untruthfulness of the statement. Lyman v. Schermerhorn, (1901) 167 N. Y. 113, 60 N. E. 324, affirming 53 App. Div. 32, 65 N. Y. S. 538. The commissioner in an action on the bond cannot assert the illegality of the certificate and recover on the bond for a sale of liquor which would be a legal sale if the certificate were valid. For example, the plaintiff cannot maintain an action on the bond where he alleges the issuance of a certificate, the invalidity of such certificate, and a violation of the law in that the holder sold liquors without a certificate. Lyman v. Kane, (1901) 57 App. Div. 549, 67 N. Y. S. 1065.

Assignment of certificates.— The principal and surety on a bond for a liquor tax certificate are liable on the bond during the life of the certificate, though it has been assigned and is in the hands of the assignee who violates the law, so long as it is not presented for cancellation or the assignment is not consented to by the proper officer in the manner required by the statute. Cullinan v. Kuch, (1904) 177 N. Y. 303, 69 N. E. 597.

So long as the business is ostensibly carried on under the same certificate, the surety on the bond is liable for violations during the term of the certificate and bond, though the owner of the certificate has ceased to be the proprietor of the premises and has no control over the same. Cullinan v. Parker, (1902) 39 Misc. 446, 80 N. Y. S. 187, affirmed 84 App. Div. 296, 82 N. Y. S. 827, affirmed (1904) 177 N. Y. 573, 69 N. E. 1122.

Surrender of certificate.— A surety is not liable on the bond for a violation committed by the certificate holder after the surrender of the certificate. Lyman v. Cheever, (1901) 168 N. Y. 43, 60 N. E. 1047, reversing 31 Misc. 100, 63 N. Y. S. 809. But see Cullinan v. Stein, (1902) 3 Liq. Tax Law Rep. 55.

Withdrawal of principal from management of premises.— A bond under this section imposes upon the certificate holder the obligation of seeing that the premises do not become disorderly so long as liquors are sold under the authority of the certificate; if the holder withdraws from the actual management of the business, but without a surrender or transfer of the certificate, and the party in management permits the premises to become disorderly, the principal and surety are liable on the bond. Cullinan v. Fidelity, etc., Co., (1903) 84 App. Div. 296, 82 N. Y. S. 827, affirmed on opinion below (1904) 177 N. Y. 573, 69 N. E. 1122.

Unsuccessful proceeding for revocation based on same violation.— In an action on a bond for a violation of the Liquor Tax Law, it is a defense if the commissioner of excise has previously maintained a proceeding for the revocation of the certificate under section 27 based on the same alleged violation and that a decision on the merits in such proceeding has been rendered in favor of the certificate holder. Clement v. Moore, (1909) 135 App. Div. 723, 119 N. Y. S. 883, wherein it was said: "While it is true that under the law the proceeding for a revocation of the license and the action for the collection of penalties are separate and distinct, and the maintenance of the one is no bar to the maintenance of the other, the rule of adjudications remains in force, to the effect that a specific determination judicially made and unreversed operates as an estoppel from a second trial of the specific matter so determined; and to operate as such an estoppel it is not necessary . . . that there should be an identity of cause of action as well as identity of parties and subject-matter."

Acquittal in criminal prosecution.— The acquittal of a certificate holder in a criminal prosecution by the People for a violation of the Liquor Tax

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Law, is not a defense in an action by the Commissioner on the bond for the same violation. Cullinan v. Hermann, (1901) 2 Liq. Tax Law Rep. 594.

Release of surety.— The state commissioner of excise cannot release a surety from liability on a bond, in consideration of payment on other bonds on which he is liable. Clement v. Reavley, (1908) 126 App. Div. 215, 110 N. Y. S. 418.

Discharge of principal in bankruptcy.— The discharge of the principal in bankruptcy does not release the debtor from liability on the bond. Lyman v. Ruehl, (1900) 2 Liq. Tax Law Rep. 410, modifying Lyman v. Ruehl, (1900) 2 Liq. Tax Law Rep. 328.

Violation of law induced by special agent.— It is no defense to an action on a bond based on an unlawful sale of liquor, that the sale was made to a special agent under the direction of the state excise department. Lyman v. Oussani, (1900) 33 Misc. 409, 68 N. Y. S. 450, reversed on other grounds 65 App. Div. 27, 72 N. Y. S. 498.

Limitation of action on bond.— The bond provided for in this section is a continuing obligation, and each breach, as it is committed, gives rise to a separate cause of action so far as concerns the statute of limitations; so that when there have been several breaches the running of the statute against one of the resulting causes of action does not bar the remedy on the others. Green v. Petersen, (1916) 218 N. Y. 280, 112 N. E. 746, affirming 170 App. Div. 975, affirming 90 Misc. 159, 154 N. Y. S. 170.

Erroneous statement of location of premises.— Where an application for a certificate erroneously states the location of the premises as No. 256 Main street, when in fact the applicant occupies premises at 257 Main street, No. 256 being a vacant lot, in an action on the bond for a violation of the Liquor Tax Law at No. 257, the surety cannot escape liability on account of the mistake in the number. Cullinan v. Fidelity, etc., Co., (1903) 41 Misc. 119, 83 N. Y. S. 969.

Unauthorized acts of agent of surety company.— A surety company which has appointed an agent "to execute and deliver and attach the seal of the company to all bonds to be filed . . . under the Liquor Tax Law," the bonds to be valid only when signed by such agent, is entitled to the personal judgment of the agent in respect to the issuance of bonds, and such agent cannot delegate his power to a clerk in his office; and where a county treasurer, with knowledge of the agent's authority and in his absence, accepts a bond issued by the clerk, who states that the agent will sign it on his return, and in the meantime the certificate for which the bond is issued is forfeited by the principal for a violation of the statute, the company is not liable on the bond, although the agent on his return in ignorance of the forfeiture affixes his signature to the bond. Cullinan v. Bowker, (1904) 180 N. Y. 93, 72 N. E. 911, affirming 88 App. Div. 170, 84 N. Y. S. 696.

Principal acting for another.— When a liquor tax certificate has been issued or transferred to a person upon his application and the filing of a bond, he is the principal whom the law will look to during the conduct of the business and will hold responsible for compliance with the statutory provisions; and it is no defense to a surety when sued on the bond that he was carrying on the business for another party. Lyman v. Kurtz, (1901) 166 N. Y. 274, 59 N. E. 903.

Evidence that violation in question was by another person.— In an action on a bond based on a violation of the Liquor Tax Law consisting in sales of liquor on Sunday in the basement of the premises under the barroom with which there was a connecting stairway, it is error to exclude evidence by the defendant to show that the basement was occupied by a subtenant and that the certificate holder was not responsible for acts committed therein. Cullinan v. Furthmann, (1902) 70 App. Div. 110, 75 N. Y. S. 90.

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V. Procedure

Judgment against principal as evidence against surety on liquor dealer's bond: see 9 Ann. Cas. 158, note; Ann. Cas. 1915D 409, note.

Amendment in 1897 authorizing suit by commissioner.— This section as it existed in the Liquor Tax Law of 1896, did not specify the party to bring an action on a bond, but an amendment in 1897 authorized the commissioner of excise to bring the action. It was held that the amendment authorized an action on a bond given in 1896, and that such amendment did not in any way impair the obligation of the contract or change the rights of the parties, but related only to the form and mode of procedure. Lyman v. Rochester Title Ins. Co., (1899) 37 App. Div. 234, 55 N. Y. S. 770. Prior to this amendment, an action was not properly brought if entitled in the name of the People on the relation of the commissioner of excise. People v. American Surety Co., (1898) 1 Liq. Tax Law Rep. 336.

Numbering and separating of causes of action.— A complaint in an action against a surety on a bond under this section states but one cause of action, though several different violations of the Liquor Tax Law are alleged therein, and the plaintiff will not be ordered to state and number the several violations as separate causes of action. Lyman v. Plymouth Social Club, (1898) 1 Liq. Tax Law Rep. 365; Lyman v. Zimbrich, (1899) 1 Liq. Tax Law Rep. 441. See to the contrary Lyman v. Fidelity, etc., Co., (1898) 1 Liq. Tax Law Rep. 340.

Allegation of time of breach.— A complaint in an action on a bond is demurrable if it fails to state the time of the violations of the Liquor Tax Law or that they occurred during the year for which the bond was given. Lyman v. Siebert, (1900) 31 Misc. 285, 65 N. Y. S. 367.

Negativing exception in favor of clubs.— In an action on a bond under this section against a so-called club and its surety for sale between one and five in the morning, it is not necessary that the complaint negative the provisions of subdivision O of section 30 relative to bona fide clubs. Cullinan v. Criterion Club, (1902) 39 Misc. 270, 79 N. Y. S. 482, affirmed without opinion 86 App. Div. 626, 83 N. Y. S. 1104.

Conclusions of law in the complaint.— An allegation in a complaint in an action on a bond under this section to the effect that certain acts are in violation of the Liquor Tax Law or of the provisions of the bond, are mere statements of conclusions of law and will be stricken out on motion. Lyman v. Plymouth Social Club, (1898) 1 Liq. Tax Law Rep. 365; Lyman v. Zimbrich, (1899) 1 Liq. Tax Law Rep. 441.

Amendment of complaint.— In an action on a bond under this section, the plaintiff will be permitted upon the trial to amend his complaint so as to allege that the certificate in question was transferred to the principal in the bond instead of being issued to such principal. Lyman v. Kurtz, (1901) 166 N. Y. 274, 59 N. E. 903.

Bill of particulars.— In an action on a bond based on an allegation that the premises were disorderly, a motion by the defendant for a bill of particulars will be granted as to the character, times, and occasions of the disorderly conduct. Lyman v. Zimbrich, (1899) 1 Liq. Tax Law. Rep. 411.

Change of venue.— The provision in this section authorizing the commissioner of excise to commence and maintain an action in any county of the state is not to be construed as depriving the court of its inherent power to change the venue of such action for the convenience of witnesses. Lyman v. Gramercy Club, (1898) 28 App. Div. 30, 50 N. Y. S. 1004.

Moving papers to change venue.— In an action on a bond under this section against the certificate holder and surety, the application for a change of venue is insufficient unless it is made by both of the defendants or some reason is given why both do not join in the motion. Lyman v. Gramercy Club, (1898) 28 App. Div. 30, 50 N. Y. S. 1004.

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Stay of proceedings.— A proceeding for the revocation of a certificate under section 27 will not be stayed during the pendency of an action on the bond under this section, though both proceedings are based on the same violations of the statute. Matter of Lyman, (1900) 32 Misc. 621, 67 N. Y. S. 502.

Separate summing up by counsel for surety.— If in an action on a bond the surety interposes a separate answer and has a separate attorney appear for him upon the trial, the court should not require the surety to acquiesce in the summing up of the attorney for the certificate holder, but should permit the counsel to present the case to the jury. Lyman v. Fidelity, etc., Co., (1901) 65 App. Div. 27, 72 N. Y. S. 498.

Privilege of certificate holder from self-incrimination.— In an action to recover on a bond under this section, the certificate holder, if called as a witness by the plaintiff, may refuse to answer questions tending to incriminate him. Cullinan v. Quinn, (1904) 95 App. Div. 492, 88 N. Y. S. 963.

Evidence of conviction of principal as against surety.— In action under this section against the principal and his surety, a judgment of conviction of the principal is sufficient evidence of a violation of the law as against such principal; but other proof must be offered as against the surety. Farley v. Patterson, (1915) 166 App. Div. 358, 152 N. Y. S. 59.

Instruction as to interest of commissioner.— Where, in an action on a bond for permitting the premises to be used for disorderly purposes, there is no evidence of financial interest on the part of the commissioner, it is error for the court to refuse to charge that the commissioner has no such interest in the bringing of the action and to submit the question to jury. Clement v. Federal Union Surety Co., (1907) 122 App. Div. 18, 106 N. Y. S. 1061.

Request by defendant to go to jury.— Where, in an action on a bond for a violation of the Liquor Tax Law, the defendant after the trial of the issues moves for a direction of a verdict in his favor, and his motion is denied, and the plaintiff thereupon moves for a direction of a verdict in his favor which is granted, the defendant's request to go to the jury on certain issues is timely if made before the verdict is taken or entered. Cullinan v. Furthmann, (1902) 70 App. Div. 110, 75 N. Y. S. 90.

Weight of evidence.— Where, in an action to recover the penalty of a bond for the unlawful sale of liquors on Sunday, the testimony of special agents of the commissioner of excise is unimpeached and substantially uncontradicted, a verdict in favor of the defendants should be set aside as against the weight of the evidence. Clement v. Beers, (1908) 126 App. Div. 1, 110 N. Y. S. 99; Cullinan v. Rorphuro, (1904) 93 App. Div. 200, 87 N. Y. S. 570. So, a verdict in favor of the defendant in an action based on illegal sales on Sunday, will be set aside where it is clearly against the weight of the evidence. Cullinan v. Kisselbrack, (1904) 43 Misc. 103, 87 N. Y. S. 1025.

Direction of verdict.— A verdict should not be directed in favor of the plaintiff on the testimony of special agents, where their evidence is so squarely contradicted that their credibility might have been affected in the minds of the jury. Clement v. Fingerlin, (1910) 136 App. Div. 847, 122 N. Y. S. 201.

VI. Amount of Recovery

Extent of liability of surety.— It is clear from an inspection of the entire statute that the said bond does not measure all the liability of the certificate holder and that the surety on the bond cannot be compelled to respond for every liability incurred by the principal. For any single violation of the provisions of the act the bond is forfeited and the surety becomes liable for the full amount thereof. That, however, is the extent of his liability. But the principal is liable not merely for the amount of the bond, but may also be liable to a fine in a criminal prosecution and in addition thereto to a penalty in a civil action. People v. United Surety Co., (1907) 120 App. Div.

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655, 105 N. Y. S. 72, holding that the surety is not liable for costs awarded in a proceeding by a private individual for the revocation of a certificate.

Costs in action.— The limitation now in this section as to the amount of recovery does not prevent the plaintiff from taxing costs and disbursements and adding the same to the verdict, although the verdict is for the full penalty of the bond. Clement v. Lunan, (1907) 189 N. Y. 547, 82 N. E. 1125, affirming 116 App. Div. 909, 101 N. Y. S. 1116.

Liability of surety for costs in revocation proceedings.— The surety on the bond of a certificate holder is not liable for costs awarded to the applicant in a proceeding under section 27 by a private individual for the revocation of a certificate. People v. United Surety Co., (1907) 120 App. Div. 655, 105 N. Y. S. 72.

Relief as to amount of damages.— "In cases between the government and a private party in which the purpose of the bond is to secure an observance of the law in pursuance of which the bond is given, and punishment or satisfaction for its non-observance, then the penalty named in the bond is the measure of damages for its breach, unless the statute under which the bond is given or the bond itself, read in the light of the statute, indicates a less or different measure. In such cases in which the statute fixes the measure of damages the courts cannot relieve against it, unless authorized by statute to do so." Lyman v. Perlmutter, (1901) 166 N. Y. 410, 60 N. E. 21.

Fines and penalties.— The recovery is the amount specified in this section, regardless of the fines or penalties which are prescribed by other sections of the law for offenses. Lyman v. Perlmutter, (1901) 166 N. Y. 410, 60 N. E. 21.

Liquidated damages.— The intention of this section was not to limit a recovery upon the bond to the civil or criminal penalties prescribed in the act for violations of its provisions, but to permit the recovery of the sums named as liquidated damages. Lyman v. Shenandoah Social Club, (1899) 39 App. Div. 459, 57 N. Y. S. 372.

§ 17. The payment of the tax and issuing of the tax certificate. When the provisions of sections fifteen and sixteen of this chapter have been complied with and the application provided for in section fifteen is found to be correct in form and does not show on the face thereof that the applicant is prohibited from trafficking in liquor under the subdivision of section eight under which he applies, nor at the place where the traffic is to be carried on, and the bond required by section sixteen is found to be correct as to its form and the sureties thereon are approved as sufficient by the county treasurer, or by the special deputy commissioner of excise, if there be one, then upon the payment of the taxes levied under section eight of this chapter the county treasurer of the county, or the special deputy commissioner of excise, if there be one, or if the application be made under subdivision four or five of section eight of this chapter, the state commissioner of excise shall, at least two days before the commencement of the period for which the tax is paid, or, if the period for which the tax is paid has already commenced, at once prepare and issue to the person making such application and filing

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such bond and paying such tax, a liquor tax certificate in the form provided for in this chapter, unless it shall appear by a certified copy of the statement of the result of an election held on the question of local option, pursuant to section thirteen of this chapter, in and for the town where the applicant proposes to traffic in liquors under the certificate applied for, or by material facts set forth in a certificate under the hand and seal of the state commissioner of excise, on file in the office of the special deputy commissioner or county treasurer, that the liquor tax certificate applied for cannot be lawfully held by the applicant or at the premises mentioned in the application as the place where traffic in liquors is proposed to be carried on, or unless it shall appear by the report filed pursuant to section thirty-two of this chapter with the special deputy commissioner of excise or county treasurer to whom the application is made that such liquor tax certificate cannot be lawfully granted, or unless it shall appear by a notice duly filed with the certificate issuing officer pursuant to the provisions of subdivision nine or ten of section eight of this chapter that such traffic has been abandoned at the premises described in the application statement, or unless the traffic is prohibited at such premises by virtue of the provisions of subdivision nine or ten of said section eight, in which case the application shall be refused.

This section was derived from the Liquor Tax Law of 1896, § 19, as amended by L. 1897, ch. 312, § 12; L. 1908, ch. 144, § 5, and L. 1908, ch. 350, § 5. It was amended to read as above by L. 1910, ch. 494, § 3, and L. 1913, ch. 168, § 3. The amendment by L. 1910 added to the last sentence following the words "lawfully granted," the words "or unless it shall appear . . . of subdivision nine of said section eight." The amendment by L. 1913, added the word "ten" between the words "subdivision nine" and "of said section eight" in the last sentence.

Section 17 of the Liquor Tax Law of 1896 is now covered by section 15.

Effect of certified copy of result of local option election: see supra, § 13. *Sufficiency of consents of nearby owners:* see supra, § 15, subd. 8. *Proof of issuance of certificates:* see supra, § 15, subd. 11. *Form of certificate:* see infra, § 18. *Surrender of certificates:* see infra, § 24. *Changing place of traffic:* see infra, § 25. *Transfer of certificates:* see infra, § 26. *Revocation of certificates:* see infra, § 27.

Prohibition against council or executive officer of municipal corporation to prevent issuance of liquor license: see 20 Ann. Cas. 962, note.

Certificate as prerequisite to right to traffic in liquors.— If a county treasurer fails to issue a certificate to an applicant entitled thereto, the applicant is not entitled to traffic in liquors; his remedy is a writ of certiorari under section 27. Clement v. Smith, (1908) 60 Misc. 595, 112 N. Y. S. 955.

Discretion of certificate issuing officer.— Under former excise laws, when the power of issuing licenses to traffic in liquors was lodged in commissioners of excise, the granting or withholding of licenses was, to a certain extent, discretionary with the commissioners. New York v. Mason, (1855) 4 E. D.

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Smith 142. And when the Liquor Tax Law of 1896 was first enacted it vested in the certificate issuing officer some discretion to inquire into the facts in the application, and to refuse to issue the certificate if he found that they did not warrant the issuance thereof. People v. Hoag, (1896) 11 App. Div. 74, 42 N. Y. S. 886. But an amendment of this section in 1897 was construed to deprive the issuing officer of all discretion and to require him to issue the certificate if the application was in proper form and its recitals showed a compliance with the statute. Matter of Adriance, (1901) 59 App. Div. 440, 69 N. Y. S. 314; Matter of White, (1903) 3 Liq. Tax Law Rep. 147; People v. Coonley, (1901) 2 Liq. Tax Law Rep. 607. The issuing officer has no power to determine whether the applicant is a person entitled to hold the certificate, if the application is in proper form and does not show on the face thereof that he is prohibited from trafficking in liquors. People v. Hilliard, (1898) 28 App. Div. 140, 50 N. Y. S. 909. But see infra, this note, paragraph *Ratio Act*.

Poor house or state hospital within half a mile.— A county treasurer acts only in a ministerial capacity; and, if the application is in due form and does not disclose a ground for the refusal of a certificate, the county treasurer cannot utilize his own knowledge that the premises are within half a mile of a poor house or state hospital and refuse the certificate on that ground. People v. Macy, (1896) 1 Liq. Tax Law Rep. 82; People v. Corkhill, (1896) 1 Liq. Tax Law Rep. 87. But see infra, this note, paragraph *Ratio Act*.

Examination of files to determine truthfulness of statements in application— A county treasurer is not permitted to enter upon an inquiry among the files in his office to determine the truthfulness of statements in an application; if the application is correct in form and does not show upon its face that the applicant is prohibited from trafficking in liquor, the certificate must be issued. People v. Walker, (1908) 60 Misc. 130, 112 N. Y. S. 1021, affirmed 128 App. Div. 908, 112 N. Y. S. 1021. But see infra, this note, paragraph *Ratio Act*.

Certificate forbidden by local option vote.— The duties of the certificate issuing officer are ministerial, and he cannot determine the form of the certified copy to be filed with him as to the result of a local option vote. People v. Foster, (1899) 27 Misc. 576, 58 N. Y. S. 574. After an election on the local option propositions, the statement filed with the county treasurer is the basis of his official action in respect to issuing certificates, and he cannot look behind the return filed with him. Therefore, on a writ of certiorari to review the action of the county treasurer, if the return shows a vote against the issuance of certificates, the relator cannot compel the county treasurer to make a further return showing the report of the votes cast at the election. Matter of Tinkcom, (1906) 50 Misc. 250, 100 N. Y. S. 467.

Where the town board did not canvass the vote on the local option propositions, but the town clerk made up a certificate from the vote and caused the same to be filed with the county treasurer, which certificate showed that the town voted against the issuance of certificates, it was held that the county treasurer was justified in refusing to issue a certificate for traffic in such town. People v. Adair, (1904) 44 Misc. 444, 89 N. Y. S. 376. Where a town has voted against the issuance of certificates, the county treasurer may refuse to issue a license, though the town clerk has failed to file in his office a certified copy of the result of such vote. Matter of Krumbholz, (1908) 60 Misc. 534, 113 N. Y. S. 1060.

Consents of owners within 300 feet.— The fact that certain property owners who executed consents for traffic in liquors pursuant to section 15, subdivision 8, have revoked their consent before the issuance of the certificate, does not excuse the officer from issuing a certificate; if the papers are in proper form, the certificate must be issued, though it is subject to revocation in a proceeding for that purpose. People v. Coonley, (1901) 2 Liq. Tax Law Rep. 607.

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Ratio Act.— While the courts prior to 1910 have repeatedly held that the duties of the county treasurer in issuing liquor tax certificates are ministerial only; that no discretion is vested in him; that he has no power to investigate; that it is his duty to issue the certificate upon payment of the tax, where proper application has been made; and that he is prohibited from examining former applications to find out whether or not they are in accord with the application newly presented to him; the broad application of these decisions seems to have been limited by the provisions of the amendment of 1910 which provide that the application shall be refused if the traffic is prohibited by virtue of the provisions of subdivision 9 of section 8. As to whether the application shall be refused on such ground, the county treasurer may resort to other papers on file in his office. People v. Shults, (1914) 87 Misc. 348, 149 N. Y. S. 913, affirmed 166 App. Div. 868, 151 N. Y. S. 910. Under this section, a county treasurer is required to refuse an application for a certificate, if the traffic on the premises is prohibited by subdivision 9 of section 8. People v. Shults, (1915) 166 App. Div. 868, 151 N. Y. S. 910, affirming 87 Misc. 348, 149 N. Y. S. 913.

When a notice of abandonment under subdivisions 9 or 10 of section 8 is in proper form and is filed in his office, the certificate issuing officer is bound to refuse the application, the number of certificates issued exceeding the ratio; and the fact that the application states that the notice of abandonment is null and void does not give him discretion to determine that question or power to issue a certificate. Farley v. O'Brien, (1915) 91 Misc. 89, 154 N. Y. S. 1021. But if the application states that no notice of abandonment has been filed, when the facts are that one has been filed but that it is void, the county treasurer may issue the certificate. Matter of Farley, (1916) 216 N. Y. 449, 111 N. E. 66.

Binding effect of surplus statements.— While the certificate issuing officer is bound by the statements in the application, he is bound by such statements only as are required or permitted by the statute and on which the right to issue a certificate depends; he is not empowered to determine questions of fact. Farley v. O'Brien, (1915) 91 Misc. 89, 154 N. Y. S. 1021.

Correction of street number in certificate.— Where by a mutual mistake of an applicant and the certificate issuing officers, the certificate describes the premises by the wrong street number, the court has no authority on motion of the holder to correct the certificate. Matter of Littleton, (1906) 113 App. Div. 471, 99 N. Y. S. 417.

Second certificate for same premises.— Where one not the owner or entitled to the possession of premises, receives a certificate for traffic at such premises, the owner or tenant is not thereby barred from receiving another certificate for the same premises, though the number of certificates already issued exceeds the ratio. People v. Masterman, (1913) 209 N. Y. 182, 102 N. E. 553, affirming 156 App. Div. 450, 141 N. Y. S. 1039, affirming 78 Misc. 337, 138 N. Y. S. 469.

Action for tax.— There is no authority conferred upon the commissioner of excise to maintain an action to collect a tax under subdivision one of section 8 outside of a city of the first class; the proper person to maintain the action is the county treasurer. Lyman v. McGreivery, (1898) 25 App. Div. 68, 48 N. Y. S. 1035, affirmed (1899) 159 N. Y. 561, 54 N. E. 1093.

Recovery of deposit when application is defective and no bond is filed.— Where one makes a preliminary deposit with a county treasurer for a certificate, but never receives a certificate because his application is defective and because he does not file the required bond, he cannot recover the deposit, for his failure to obtain the certificate is due to his own neglect to comply with the statutory requirements. Scalzo v. Sackett, (1900) 30 Misc. 543, 63 N. Y. S. 820.

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Oral proof of issuance of certificate.— Oral proof is admissible to show the issuance of a liquor tax certificate; or one who saw the certificate in the window of the holder may testify as to it. Cullinan v. Horan, (1907) 116 App. Div. 711, 102 N. Y. S. 132.

Cited.— People v. Farley, (1914) 163 App. Div. 100, 148 N. Y. S. 412 affirmed (1915) 214 N. Y. 607 mem.; Farley v. Dittman, (1913) 155 App. Div. 363, 140 N. Y. S. 321, affirmed without opinion (1914) 213 N. Y. 659, 107 N. E. 1077. Opp. Atty.-Gen. (1913) 532.

§ 18. Form of liquor tax certificate. The liquor tax certificates shall be furnished by the state commissioner of excise to the several county treasurers, and to the special deputy commissioners, and shall be lithographed or engraved in a suitable manner, and on durable paper, and of the following form:

$..... No.....

Series of ..... (A suitable device inserted.) Series of .....

STATE OF NEW YORK.

Liquor Tax Certificate.

Received from .....the sum of ..... dollars for excise tax on the business of trafficking in liquor under subdivision..... of section eight of the Liquor Tax Law, the business to be carried on at....., in the..... of ....., for the period represented by the coupon or coupons hereto attached.

Dated at .....19..

.....
Special Deputy Commissioner
for the ..... of .....
or
County Treasurer of ..... County.

Severe penalties are imposed for neglect or refusal to place and keep this certificate conspicuously in your place of business, properly framed, as provided by the liquor tax law. (See section 19.)

[*For sample form of Liquor Tax Certificate, see page following.*]

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$_____$ (Sample Form.) (Insert Suitable Device.) No. _____

SERIES OF 1896. SERIES OF 1896.

STATE OF NEW YORK.

LIQUOR TAX CERTIFICATE.

RECEIVED from _____ the sum of _____ dollars for excise tax on the business of trafficking in liquors under subdivision _____ of section eight of the Liquor Tax Law, the business to be carried on at _____ in the _____ of _____ for the period represented by the coupon or coupons hereto attached.

Dated at _____

_____

—189—. Special Deputy Commissioner for the _____ of _____

(Or County Treasurer of _____ County),

State of New York.

SEVERE PENALTIES are imposed for neglect or refusal to place and keep this certificate conspicuously in your place of business, as provided by the liquor tax law. (See Sec. 19.)

Consent is hereby given for the transfer of this liquor tax certificate to .....

.....

Date .....

.....

County Treasurer or Special Deputy Commissioner.

Consent is hereby given for the transfer of this liquor tax certificate to .....

.....

Date .....

.....

County Treasurer or Special Deputy Commissioner.

The traffic in liquors permitted to be carried on under this certificate is hereby transferred from .....

to .....

Date .....

.....

County Treasurer or Special Deputy Commissioner.

The traffic in liquors permitted to be carried on under this certificate is hereby transferred from .....

to .....

Date .....

.....

County Treasurer or Special Deputy Commissioner.

This certificate can be transferred only to a place in the same city or town.

Coupon for LIQUOR TAX CERTIFICATE	Sept.,	1897.
Coupon for LIQUOR TAX CERTIFICATE	Aug.,	1897.
Coupon for LIQUOR TAX CERTIFICATE	July,	1897.
Coupon for LIQUOR TAX CERTIFICATE	June,	1897.
Coupon for LIQUOR TAX CERTIFICATE	May,	1897.
Coupon for LIQUOR TAX CERTIFICATE	April,	1897.
Coupon for LIQUOR TAX CERTIFICATE	March,	1897.
Coupon for LIQUOR TAX CERTIFICATE	Feb.,	1897.
Coupon for LIQUOR TAX CERTIFICATE	Jan.,	1897.
Coupon for LIQUOR TAX CERTIFICATE	Dec.,	1896.
Coupon for LIQUOR TAX CERTIFICATE	Nov.,	1896.
Coupon for LIQUOR TAX CERTIFICATE	Oct.,	1896.

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Attached thereto on the left as a part thereof shall be twelve coupons, one for each month of the tax year. On the one on the extreme left shall be printed:

"Coupons for liquor tax certificate, October 19....," and each coupon shall be similarly printed except as to the month. A tax certificate similar in form shall be issued by the state commissioner of excise, to those applying under subdivision four of section eight of this chapter.

This section was derived from the Liquor Tax Law of 1896, § 20, as amended by L. 1908, ch, 144, § 6.

Section 18 of the Liquor Tax Law of 1896 is now covered by section 16.

Tax to be paid for certificate: see supra, § 8. *Transfer of certificate as security:* see supra, § 12a. *Local option to determine whether certificate shall be issued:* see supra, § 13. *Application for certificate:* see supra, § 15. *Proof of issuance of certificate:* see infra, § 15, subd. 11. *Issuance of certificate:* see supra, § 17. *Posting of certificate:* see infra, § 19. *Surrender of certificate:* see infra, § 24. *Changing place of traffic:* see infra, § 25. *Assignment of certificate:* see infra, § 26. *Revocation of certificate:* see infra, § 27. *Forfeiture of certificate:* see infra, § 36.

Nature of certificate generally.— "A liquor tax certificate is the printed and written acknowledgment, in statutory form, by the authorized representative of the state, of the receipt from the applicant for it of the statutory sum for the excise tax on the business of trafficking in liquors as a designated place for a designated term. It is evidence to the public of the right of its lawful holder to so traffic, and so long as that right is exercised under it, it must be conspicuous within the designated place. At the termination of the term or upon its surrender within the term, it becomes exhausted and impotent for the purposes for which it was issued." Matter of Farley, (1915) 214 N. Y. 212, 108 N. E. 417. "The certificate itself is an official document in statutory form, stating that a person named has paid a sum of money for an excise tax for trafficking in liquors for a stated period. The certificate has a value given to it by the statute, whereby it may be surrendered and a portion of the money paid be refunded, or a new certificate issued for business elsewhere, or the assignee may be permitted to do business at the place for which the certificate was issued. The certificate represents property and is itself property somewhat as a warehouseman's receipt is personal property." Bachmann-Bechtel Brewing Co. v. Gehl, (1913) 154 App. Div. 849, 139 N. Y. S. 807. "A liquor tax certificate is merely a receipt for money paid, and its real import is only that of a voucher for the money paid for the excise tax, because the right to engage in the traffic is derivable, not from the certificate, but from the statute, and from the statements made in the application upon which the certificate is issued." People v. Lyman, (1900) 33 Misc. 243, 68 N. Y. S. 331.

Certificate as personal property.— A liquor tax certificate is personal property. Niles v. Mathusa, (1900) 162 N. Y. 546, 57 N. E. 184; Matter of Livingston, (1897) 24 App. Div. 51, 48 N. Y. S. 989; Frank v. Forgotson, (1899) 2 Liq. Tax Law Rep. 207. A certificate, if not property in the strict sense in which that word is used, constitutes a property right. Matter of Cullinan, (1904) 94 App. Div. 445, 88 N. Y. S. 164. "These certificates are recognized by the statute under which they are issued as a species of property transferable from one to another. They are evidence of a right or privilege to carry on a certain kind of business, issued by the state to the individual, and hence a thing of pecuniary value." Matter of Peck, (1901) 167 N. Y. 391, 60

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N. E. 775, 53 L. R. A. 888. "The liquor tax certificate issued under the existing law is essentially different from the former license. The license was a mere personal privilege which the holder took subject to all the conditions of law by which it was rendered revocable. The certificate represents a species of property which is transferable by the owner and which is accordingly protected by the general rules of law in any proceeding having for its object the forfeiture or destruction of the rights which it confers." Matter of Cullinan, (1903) 82 App. Div. 445, 81 N. Y. S. 567.

Certificate as property right subject to constitutional protection.— A person receiving a liquor tax certificate based upon the payment of the amount assessed as a tax, acquires certain vested rights. He has paid to the state a sum of money as a condition that he may conduct a business, which, by the imposition of a tax, becomes a legal business for one year; and he cannot be deprived of his property rights without due process of law. People v. Flynn, (1905) 110 App. Div. 279, 96 N. Y. S. 655, affirmed (1906) 184 N. Y. 579, 77 N. E. 1194, wherein it was said: "It must, I think, be conceded that the person who paid to the State the tax imposed by the Liquor Tax Law and received a liquor tax certificate thereby acquired a property right to protect which he was entitled to appeal to the courts. This property right, of course, was subject to the conditions imposed by the statute, and it was subject to be rendered valueless by the procedure provided in the statute for its revocation. But under the statute, when the plaintiff's certificate was issued, it could only be revoked or canceled by a judicial determination in the proceeding to which the holder of the certificate was a party and in which he had an opportunity of being heard. For the legislature to deprive the holder of the certificate of his property right, without judicial proceeding and without the opportunity of being heard, seems to me to be a plain violation of the provision of section 6 of article 1 of the Constitution that no person shall deprived of life, liberty or property without due process of law. Once establish the fact that the owner of such certificate acquires by it a property right, whatever it may be called, he can only be deprived of that property right by due process of law; and any attempt of the legislature to divest him of it without notice and without an opportunity of contesting the alleged facts upon which it is sought to divest him is depriving him of property without due process of law."

Certificate as a chattel.— Though a liquor tax certificate is property, it is not a chattel within the purview of the provisions of the Lien Law relating to the filing of chattel mortgages. Niles v. Mathusa, (1900) 162 N. Y. 546, 57 N. E. 184, affirming 20 App Div. 483, 47 N. Y. S. 38; D. M. Koehler, etc., Co. v. Flebbe, (1897) 21 App. Div. 210, 47 N. Y S. 369; Matter of Jenney, (1897) 19 Misc. 244, 44 N. Y. S. 84, affirmed 19 App. Div. 627, 46 N. Y. S. 1094. As property, however, it may be the subject of a valid mortgage. People v. Durante, (1897) 19 App. Div. 292, 45 N. Y. S. 1073. And see, supra, § 12a, as to transfers of certificates as security.

Mortgage on certificate to be issued.— A mortgage on a certificate which has not been issued gives the mortgagee therein no rights at law, but the mortgage is good in equity as a contract to assign the certificate when it is acquired. McNeeley v. Welz, (1901) 166 N. Y. 124, 59 N. E. 697, affirming (1897) 20 App. Div. 566, 47 N. Y. S. 310. See also Anchor Brewing Co. v. Burns, (1898) 32 App. Div. 272, 52 N, Y. S. 1005.

Certificate as a contract.—"The certificate, when it has been issued, constitutes a contract between the person who received it and the state, by which, for the consideration paid by the owner, the state has granted to him an absolute right to traffic in liquors for one year from the first of May subsequent to the date on which the certificate is granted, and of which he can only be deprived for some violation of the law so long as the statute remains in force. The right is a valuable one. It is property, and the person who

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receives it has the same right to be protected in this property as in any other for which he has paid a valuable consideration and of which he is the owner." Matter of Hilliard, (1898) 25 App. Div. 222, 49 N. Y. S. 286, affirmed without opinion (1898) 155 N. Y. 702, 50 N. E. 1118.

Certificate as a license.—"While the certificate issued under the Liquor Tax Law is in many essentials materially different from the license issued under the former law, it is, nevertheless, in the nature of a license, the procurement of which and the posting thereof constituting permission or license to sell." People v. Seeley, (1905) 105 App. Div. 149, 93 N. Y. S. 982, affirmed (1905) 183 N. Y. 544, 76 N. E. 1102.

Liability to execution.— A certificate is a mere chose in action and is not property which is subject to levy and sale under an execution, at least where an attachment has not been issued and levied. McNeeley v. Welz, (1901) 166 N. Y. 124, 59 N. E. 697, affirming 20 App. Div. 566, 47 N. Y. S. 310.

Replevin.—A liquor tax certificate is personal property and a person to whom it is assigned as collateral security may maintain an action of replevin to recover its possession; and in such an action it is not necessary for the plaintiff to allege the facts showing that he is not forbidden to traffic in liquors under the statute. Bachman-Bechtel Brewing Co. v. Gehl, (1913) 154 App. Div. 849, 139 N. Y. S. 807.

Death of member of firm owning certificate.— A certificate which is the property of a firm, on the death of one of the members thereof, goes to the surviving member as survivor. Matter of Lyman, (1901) 2 Liq. Tax Law Rep. 457.

Cited.— Farley v. Dittmann, (1913) 155 App. Div. 363, 140 N. Y. S. 321, affirmed without opinion (1914) 213 N. Y. 659, 107 N. E. 1077.

§ 19. Posting liquor tax certificate. Before commencing or doing any business for the time for which the excise tax is paid and the certificate is given, the said liquor tax certificate shall be inclosed in a suitable wood or metal frame, having a clear glass face and a substantial wood or metal back, so that the whole of said certificate may be seen therein and shall be posted up and at all times displayed in a conspicuous place in the room or bar where the traffic in liquors for which the tax was paid is carried on, so that all persons visiting such place may readily see the same, but if there be a door opening from the street into the room or barroom where the traffic in liquors is carried on and a window facing the street upon which such door opens, such certificate shall be displayed in such window, so it may be readily seen from the street. It shall be unlawful for any person holding a liquor tax certificate to post such certificate, or to permit such certificate to be posted upon premises other than those for which such certificate was issued or to which it has been transferred under sections twenty-five or twenty-six [1] of this chapter, or upon premises where traffic in liquors is being carried on by any person other than the

[1] Words "or twenty-six" new.

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holder of such certificate; or to knowingly deface or destroy any liquor tax certificate. Certificates issued by the state commissioner of excise to common carriers shall be framed and posted conspicuously at the bar, if on a boat, where the same may be readily seen by the passengers; if on a car, the certificate, together with any transfer permit of same, granted for such car, shall be framed and conspicuously posted in the car for which it was issued or to which it has been transferred, so that all passengers may readily see the same. Whenever a certificate, issued in accordance with any of the provisions of this chapter, shall be lost or destroyed without fault on the part of the holder thereof or his agents or employees, a duplicate certificate in lieu thereof, under the original statement and bond, may be issued by the state commissioner of excise in his discretion and in accordance with such rules and regulations as he may prescribe. When the holder of a liquor tax certificate under this chapter shall have presented the application and bond as required by sections fifteen and sixteen of this chapter, and paid the tax assessed by this chapter, not less than fifteen days before the time fixed for the expiration of such tax certificate, such holder of such tax certificate may continue to traffic in liquors pending the issue of the tax certificate, until notified in writing, by the officer charged with the duty of issuing such tax certificate, that such tax certificate so applied for will not be issued. If the application is refused the moneys thus paid shall be returned to the applicant within ten days from the receipt of the same, with said notice, by the said certificate issuing officer. To continue to traffic in liquor after such notice is received is a violation of this law and subjects the person violating to the penalties prescribed for trafficking in liquors without having a liquor tax certificate.

This section was derived from the Liquor Tax Law of 1896, § 21, as amended by L. 1897, ch. 312, § 13; L. 1901, ch. 640, § 4, and L. 1903, ch. 486, § 10. It was amended to read as above by L. 1911, ch. 407, § 1. The amendment is shown in the footnote.

Section 19 of the Liquor Tax Law of 1896 is now covered by section 17.

Failure to post in window.— Where there is a door opening from the barroom to the street and there is window facing the street where such door opens, the certificate must be displayed in the window; if in such a case it is hung on the wall of the barroom the statute is violated and the certificate may be revoked under section 27. Matter of Chapman, (1909) 64 Misc. 440, 119 N. Y. S. 352.

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Cancellation for failure to comply with section.— The failure to keep the certificate displayed in the room or bar where the traffic in liquors was carried on, renders the certificate liable to cancellation under the provisions of section 27, subdivision 2. Matter of Michell, (1899) 41 App. Div. 271, 58 N. Y. S. 632.

§ 20. Restrictions on the traffic in liquors in connection with other business. No corporation, association, copartnership or person engaged in carrying on the business of selling dry goods or groceries, or provisions, or drugs as a pharmacist, shall be assessed under subdivision one of section eight of this chapter, or receive a liquor tax certificate under such subdivision, unless it be to carry on the traffic in liquors under such subdivision one at some other building entirely distinct and separate from, and not communicating with the place where, and in which, such business of selling dry goods, groceries, provisions or drugs as a pharmacist is carried on, or if in the same building, then only in a room which is separated by partitions at least three inches thick, extending from floor to ceiling, with no opening or means of entrance or communication between the room where the traffic in liquors is carried on and the store or rooms in which the selling of dry goods, groceries, provisions or drugs as a pharmacist is carried on, so that it is necessary to go into a public street before the one place can be entered upon leaving the other.

This section was derived from the Liquor Tax Law of 1896, § 22, as amended by L. 1897, ch. 312, § 14.

Section 20 of the Liquor Tax Law of 1896 is now covered by section 18.

Injunction against unlawful traffic: see infra, § 28.

§ 21. Corporations, associations, copartnerships or persons who or which shall not traffic in liquors. No corporation, association, copartnership or person mentioned in this section shall traffic in liquors except as herein provided:

1. No person:

a. Who has been or shall be convicted of a felony, or knowingly has in his employ a person who has been so convicted; or

b. Who is under the age of twenty-one years; or

c. Who is not a citizen of the United States and a resident of the state of New York; or

d. Who shall be convicted for a violation of this chapter, until one year from the date of such conviction; or

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e. Whose agent or agents shall be twice convicted within a period of two years for a violation of this chapter, until one year from the date of such second conviction.

2. No corporation or association incorporated or organized under the laws of another state or country; provided, however, that if such corporation or association be acting as a common carrier or be operating dining, buffet, parlor or sleeping cars in this state, it may be granted a liquor tax certificate under subdivision four of section eight of this chapter. And in case any car for which a liquor tax certificate is held shall be withdrawn from the service for repairs, or leave the state, such certificate may be temporarily transferred to a substitute car, in accordance with such rules and regulations as the state commissioner of excise shall prescribe, without payment of any transfer fee.

3. No copartnership, unless one or more of the members of such copartnership, owning at least one-half interest in the business thereof, shall be a resident of this state and a citizen of the United States.

4. No person who shall have a liquor tax certificate revoked, without conviction, in a civil proceeding under subdivision two of section twenty-seven of this chapter for a violation of any provision of this chapter, until the expiration of one year from the date of the entry of a final order canceling such certificate.

5. No corporation, association or copartnership which has been or shall be convicted for a violation of this chapter, nor if an officer, member or agent thereof has been or shall be twice convicted for a violation of this chapter, until three years from the date of such conviction.

6. No corporation organized under chapter five hundred and fifty-nine of the laws of eighteen hundred and ninety-five, and the acts amendatory thereof, or under any law which prior to May sixth, eighteen hundred and ninety-five, provided for the organization of societies or clubs for social, recreative or similar purposes, which traffics in liquors with any person other than the members thereof.

7. No person, who, as owner or agent, shall suffer or permit any gambling in the place designated by the liquor tax certificate as that in which the traffic in liquor is to be carried on, or in any yard, booth, garden or any other place appertaining thereto or connected therewith, or suffer, permit or have any opening or

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means of entrance or passageway for persons or things between the room where the traffic in liquors is carried on, and any other room or place where any person whosoever suffers or permits any gambling, or suffer or permit such premises to become disorderly, or suffer, permit or have any opening or means of entrance or passageway for persons or things between the room or place where the traffic in liquors is carried on, and any other room or place which any person whosoever suffers or permits to become disorderly, or carries on or permits to be carried on or is interested in any traffic, business or occupation, the carrying on of which is a violation of law.

This section was derived from the Liquor Tax Law of 1896, § 23, as amended by L. 1897, ch. 312, § 15; L. 1900, ch. 80, § 1; L. 1900, ch. 367, § 6; L. 1905, ch. 680, § 2, and L. 1908, ch. 350, § 6. It was amended to read as above by L. 1909, ch. 281, § 7, and L. 1910, ch. 503, § 3. The amendment by L. 1909 added "or" at end of paragraph "d" in subd. 1, and struck out, in subd. 4, "corporation, association, copartnership or" before "person" and "which or" after "person" and substituted "of this chapter" for "thereof" after "provision". The amendment by L. 1910, changed the period of time given in paragraph d from three years to one year, and added to subdivision e after the word "convicted" in the first line, the words "within a period of two years."

Section 21 of the Liquor Tax Law of 1896 is now covered by section 19.

Injunction against unlawful traffic: see infra, § 28. *Action on bond for violation of law:* see supra, § 16. *Revocation of certificate for violation of law:* see infra, § 27. *Criminal liability for violation:* see infra, § 30. *Places for which certificate will not be issued:* see infra, § 23. *Definition of "convicted":* see supra, § 2. *"Common gambler" defined:* see PENAL LAW, § 970. *Seizure and destruction of gambling instruments:* see PENAL LAW, §§ 977–979.

Validity of statute limiting granting of liquor licenses to residents or citizens of state: see 16 Ann. Cas. 1060, notes, 40 L. R. A. (N. S.) 284, 16 L. R. A. (N. S.) 1033. *Validity of intoxicating liquor statute which makes distinction between races with respect to granting of license or otherwise:* see Ann. Cas. 1916E 170, note. *Right of corporation to license for sale of intoxicating liquors:* see 17 Ann. Cas. 1001, note. *Right of municipal corporation to engage in sale of liquors:* see 31 L. R. A. (N. S.) 117, note. *Prohibition of certain persons from engaging in liquor business as licensing those not described:* see Ann. Cas. 1913D 633, note. *Control by mandamus of decision of licensing officer as to fitness of applicant:* see 27 L. R. A. (N. S.) 1195, note.

Person convicted of felony.— A certificate issued to one who has been convicted of a felony, is, at the election of the state, void ab initio. Lyman v. Schermerhorn, (1901) 167 N. Y. 113, 60 N. E. 324. Such a certificate may be revoked in a proceeding under section 27, subdivision 2. Matter of Johnston, (1897) 1 Liq. Tax Law Rep. 167. Where a certificate has been issued to one convicted of a felony, it is void ab initio, and an assignee of such certificate acquires no rights thereunder. People v. Lyman, (1900) 33 Misc. 243, 68 N. Y. S. 331. Where one convicted of a felony has received a pardon, he is eligible to receive a liquor tax certificate. People v. Sackett, (1896) 17 Misc. 405, 40 N. Y. S. 413.

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Conviction of agent.— Two convictions had at the same time of the same employee for offenses committed at the same time, not shown to have been committed on the premises or in the business of the employer, do not forfeit the certificate of the employer or disqualify him from trafficking in liquors for the prescribed period. Matter of Cullinan, (1904) 3 Liq. Tax Law Rep. 457.

As the Liquor Tax Law read in 1908, after the conviction of an employee for a violation of the law and the consequent revocation of the certificate, the holder could obtain a new certificate within one year for the same premises. People v. McKee, (1908) 59 Misc. 368, 112 N. Y. S. 338. A bartender who has been convicted of a violation of the Liquor Tax Law does not violate subdivision 1-d of this section by making a sale within one year from the date of his conviction, as the expression "trafficking in liquors" as used in this section refers only to traffic by the certificate holder. People v. Flynn, (1904) 3 Liq. Tax Law Rep. 429. For a definition of "trafficking in liquors," see supra, section 2.

Executor.— While an executor may lease the trust premises to another for traffic in liquors, it has been held that a certificate cannot be issued to the executor for traffic for the benefit of the estate. People v. Sackett, (1896) 1 Liq. Tax Law, Rep. 51. See infra, section 24, as to the continuance of the traffic by the representative of a deceased certificate holder.

Certificate issued to persons not copartners in fact.— Where it clearly appears that two persons to whom a certificate was issued as copartners, were not in fact copartners, the certificate will be revoked under section 27, even though the certificate has passed into the hands of assignees who have parted with value therefor without knowledge of the fact that such persons were not copartners. People v. Hilliard, (1903) 81 App. Div. 71, 80 N. Y. S. 792, affirmed without opinion (1904) 178 N. Y. 582, 70 N. E. 1106

Gambling.— The fact that the premises are in charge of an agent of the certificate holder during the absence of the latter, is no excuse for gambling on the premises, though it is done without the knowledge or consent of the principal, and the certificate may be revoked under section 27 for such gambling. Matter of Cullinan, (1903) 88 App. Div. 6, 84 N. Y. S. 492. As to liability on the bond for gambling, see supra, section 16. Revocation of certificate for gambling, see infra, section 27. Gambling as a criminal offense, see infra, section 30.

Cited.— Matter of Farley, (1914) 213 N. Y. 15, 106 N. E. 756, Ann. Cas. 1916C 494, L. R. A. 1916D 816; Bachmann-Bechtel Brewing Co. v. Gehl, (1913) 154 App. Div. 849, 139 N. Y. S. 807; Marquardt v. Clement, (1910) 68 Misc. 96, 124 N. Y. S. 934.

§ 22. Certain officials not to be interested in manufacture or sale of liquors. It shall be unlawful for any excise commissioner deputy excise commissioner, special deputy excise commissioner, excise inspector, police commissioner, police inspector, sheriff, deputy sheriff or under sheriff, captain, sergeant, roundsman, patrolman or other police official or subordinate of any police department or any other peace officer, to be either directly or indirectly interested in the manufacture or sale of spirituous or malt liquors, ales, wines or beer or to offer for sale, or recommend to any dealer therein, any spirituous or malt liquors, ales, wines or beer.

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The solicitation or recommendation made to any dealer therein, to purchase any spirituous or malt liquors, ales, wines or beer by any excise commissioner, deputy excise commissioner, special deputy excise commissioner, excise inspector, sheriff, deputy sheriff or under sheriff, police official or subordinate as hereinabove described, or any other peace officer, shall be presumptive evidence of such official or subordinate being interested in the manufacture or sale of such spirituous or malt liquors, ales, wines or beer.

This section was derived from L. 1890, ch. 163, §§ 1, 2. It was amended to read as above by L. 1916, ch. 207. The amendment added "deputy excise commissioner", "special deputy excise commissioner", "sheriff", "deputy sheriff", "under sheriff", and "any other peace officer". The amendment also struck out the words "commissioner of excise or inspector of excise, in the several villages, towns and cities of this state."

Section 22 of the Liquor Tax Law of 1896 is now covered by section 20.

Oath that commissioner of excise was not interested under former statute.— Chapter 163 of the Laws of 1890 made it unlawful for any excise commissioner to be interested in the sale or manufacture of liquors, but section 3 of such statute which required every commissioner within thirty days after the passage of the act to take an oath that he was not so interested, was held unconstitutional, as an infringement of section 1 of article XIII of the Constitution relative to the oath of office of public officials. People v. Palen, (1893) 74 Hun 289, 26 N. Y. S. 225.

Cited.— Bachmann-Bechtel Brewing Co. v. Gehl, (1913) 154 App. Div. 849, 139 N. Y. S. 807.

§ 23. Places in which traffic in liquor shall not be permitted. Traffic in liquor shall not be permitted:

1. In any building or upon any premises or lands established as a penal institution, protectory, industrial school, asylum, state hospital, state agricultural and industrial school, colony or institution established for the care or treatment of epileptics, or poorhouse, and if such building, premises or lands, other than a county jail or state prison, be situated in a town and outside the limits of an incorporated village or city, not within one-half mile of any building, premises or lands so occupied, provided there be such distance of one-half mile between such building, premises and lands and the nearest boundary line of such village or city; provided, however, that this prohibition shall not apply to a place, which on the twenty-third of March, eighteen hundred and ninety-six, was lawfully occupied for a hotel and situated within one-half mile of a poorhouse; and provided, also, that such prohibition shall not apply to any place within the above prescribed limit of a

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building, premises or lands occupied as a state hospital, if simultaneously with the filing of each application statement descriptive of such traffic, there shall be filed a consent in writing that such traffic in liquors be so carried on during the term stated in the application, executed by a majority of the board of managers, and the superintendent of such state hospital, and acknowledged as are deeds entitled to be recorded.

2. Under the provisions of subdivision one of section eight of this chapter, in any building, yard, booth or other place which shall be on the same street or avenue and within two hundred feet of a building occupied exclusively as a church or schoolhouse; the measurements to be taken in a straight line from the center of the nearest entrance of the building used for such church or school to the center of the nearest entrance of the place in which such liquor traffic is desired to be carried on; provided, however, that this prohibition shall not apply to a place which on the twenty-third of March, eighteen hundred and ninety-six, was lawfully occupied for a hotel, nor to a place in which such traffic in liquors was actually lawfully carried on at that date, nor to a place which at such time was occupied, or was in process of construction, by a corporation or association which traffics in liquors solely with the members thereof, nor to a place within such limit to which a corporation or association trafficking in liquors solely with the members thereof, at such date may remove; nor to any place within the above prescribed limit of a building occupied exclusively as a church, if, simultaneously with the filing of an application statement descriptive of such traffic, there shall be filed a consent in writing that such traffic in liquors be so carried on during a term therein stated, executed by the corporation, association or society using such building as a church, or the duly authorized agent thereof, and acknowledged as are deeds entitled to be recorded; nor to a place in which traffic in liquors was lawfully carried on continuously from a date prior to the date when a building on the same street or avenue and within two hundred feet of said place has been occupied exclusively as a church or schoolhouse; nor to any premises which have been continuously occupied for a hotel from a date prior to the date when a building on the same street or avenue and within two hundred feet of said premises has been occupied exclusively as a church or schoolhouse; but none of the exceptions under this subdivision shall

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apply to subdivision one of this section, or to any of the places enumerated in this subdivision which shall have had a liquor tax certificate for trafficking in liquors in such place revoked after the first day of May, nineteen hundred and five, or forfeited for any violation of law committed after the first day of May, nineteen hundred and eight, providing the violation of law for which such revocation or forfeiture was had was either that the certificated premises had been suffered or permitted to be disorderly or that gambling had been suffered or permitted therein, unless consent as hereinbefore provided shall thereafter be obtained and filed.

3. In any premises or in any yard, booth, garden or other place appertaining thereto or connected therewith, so long as said premises continue to be occupied, not exceeding one year, by any person who was the holder of a certificate for traffic in liquors at said premises revoked and cancelled, or forfeited under any section of this chapter, or which premises continue to be occupied not exceeding one year by a member of the family of such person, or his agent or any person in his employ or representing him, unless there shall be obtained and filed simultaneously with the application statement for a certificate for traffic in liquors at said premises a consent in writing that such traffic in liquors be so carried on in said premises, as required by the provisions of subdivision eight of section fifteen, notwithstanding any other provision of this chapter. Provided, that the discontinuance of traffic in liquors for one year or less by reason of the provisions of this subdivision shall not operate or be construed to forfeit any right of traffic, which, under the provisions of this section or of section fifteen of this chapter, attached to the place for which such forfeited or revoked certificate was held.

4. In any premises or in any yard, booth, garden or other place appertaining thereto or connected therewith which any person while the holder of a liquor tax certificate issued for said premises, or his agent, had suffered or permitted to become disorderly or in which such person had suffered or permitted any gambling, or in any premises which have or had any opening or means of entrance or passageway for persons or things between such premises and any other room or place which any such person whosoever has suffered or permitted to become disorderly or in which any gambling has been suffered or permitted, by reason of which offense or

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offenses any liquor tax certificate has been revoked or any such person has been convicted of a violation of the provisions of clause e of section thirty of this chapter relating to gambling or disorder, or of section eleven hundred and forty-six or any section of article eighty-eight of the penal law, until one year from the date of the entry of the order revoking a certificate or the judgment of conviction for such violation, notwithstanding at the time of any such conviction there be an unexpired liquor tax certificate issued for said premises not forfeited by reason of such conviction or notwithstanding at the time of such revocation or conviction the said premises be not certificated for traffic in liquors; provided that the said period of one year shall be computed from the date of the actual discontinuance of the traffic in liquors at the premises by reason of any such revocation or conviction, and any period of time subsequent to such revocation or conviction during which such traffic is not discontinued, whether by reason of the existence of a stay or injunction order or the pendency of any action or proceeding, or otherwise, shall not be deemed a part or portion of the said period of one year; provided further that the discontinuance of traffic in liquors for one year, by reason of the provisions of this subdivision shall not operate or be construed to forfeit any right to traffic which, under the provisions of this section or of section fifteen of this chapter, attached to the premises where traffic is so discontinued.

5. In any form, in, upon or from any vehicle, except as provided in subdivisions four and five of section eight of this chapter.

6. Upon any premises used for and as a cemetery.

This section was derived from the Liquor Tax Law of 1896, § 24, as amended by L. 1896, ch. 445; L. 1897, ch. 312, § 16; L. 1904, ch. 485; L. 1905, ch. 104; L. 1905, ch. 677, § 3, and L. 1908, ch. 350, § 7. It was amended to read as above by L. 1910, ch. 704; L. 1911, ch. 643, § 2, and L. 1915, ch. 654, § 5. The amendment by L. 1910 added the words "to a place which on the twenty-third of March . . . shall not apply." following the first semicolon in subdivision 1. The amendment by L. 1911 affected subdivision 2 by adding the words "nor to a place in which traffic . . . church or schoolhouse" following next after the words "to be recorded." Subdivisions 3 and 4 were added, and the provisions of former subdivisions were made subdivisions 5 and 6.

Section 23 of the Liquor Tax Law of 1896 is now covered by section 21.

Statement in application as to distance from church or schoolhouse: see supra, § 15, subd. 5. *Consents of owners of dwellings within 300 feet:* see supra, § 15, subd. 8. *Cancellation of certificate wrongfully issued:* see infra, § 27.

At or near polling places: see ELECTION LAW, § 299. *At New York State Soldiers' and Sailors' Home:* see PUBLIC BUILDINGS LAW, § 62. *At military*

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encampments: see MILITARY LAW, § 240. *In courthouse during court:* see PENAL LAW, § 1790. *In jails:* see PENAL LAW, § 1791; PRISON LAW, §§ 349, 350.

Introduction of spirituous or malt liquors into arsenal or armory: see PENAL LAW, § 1485.

Reports by police and certain departments of buildings in which liquor traffic is conducted: see ELECTION LAW, § 483.

Constitutionality of statute prohibiting sale of liquor in particular locality: see 8 Ann. Cas. 258 note. *What is included in term "premises" in statute relating to sale of intoxicating liquor:* see Ann. Cas. 1916C 1193 note. *Meaning of term "church" in statutes prohibiting sale of liquor within specified distance of church:* see the following notes: 9 Ann. Cas. 1113; Ann. Cas. 1914D 774; 43 L. R. A. (N. S.) 1142; 22 L. R. A. (N. S.) 194. *Meaning of term "school" or "schoolhouse" within statute prohibiting sale of liquor within certain distance thereof:* see the following notes: 16 Ann. Cas. 924; 43 L. R. A. (N. S.) 1142; 22 L. R. A. (N. S.) 194. *Sale by others than retail saloon keepers as violation of statute forbidding sale within given distance of school or church:* see 39 L. R. A. (N. S.) 615 note. *Must indictment or information for sale of liquor within prohibited distance state name of person to whom sale is made?:* see 23 L. R. A. (N. S.) 582 note.

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I. LANDS OF UNITED STATES

Certificate void.— Where the state has given its consent to the purchase of lands by the United States, the legislative power of the United States over the lands purchased is exclusive, and the state has no power to license the traffic in liquors on such premises though the United States has not prohibited the traffic; and a liquor tax certificate issued for such premises is a nullity and furnishes no consideration for the bond given by the holder of the certificate and no recovery can be had on the bond for a violation of the law. Farley v. Scherno, (1913) 208 N. Y. 269, 101 N. E. 891, 47 L. R. A. (N. S.) 1031.

II. PUBLIC PREMISES

Liberal construction.— The Liquor Tax Law is to be liberally construed in favor of state buildings and other institutions which are permitted to be a certain distance away from liquor selling. Matter of Clement, (1907) 54 Misc. 352, 105 N. Y. S. 1054; Matter of Brady, (1907) 106 N. Y. S. 921.

Hospital buildings.—A certificate for premises situated within 75 feet of the lands of a state hospital will be revoked, though the hospital buildings on such lands are more than a half mile from the premises for which the certificate was issued. Matter of Clement, (1908) 125 App. Div. 676, 110 N. Y. S. 57. The words "building, premises or lands" are not confined to the grounds upon which the buildings stand, but include such contiguous property and premises as are used by and belong to the institution and are used

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and cultivated for garden truck. Matter of Clement, (1907) 54 Misc. 352, 105 N. Y. S. 1054; Matter of Brady, (1907) 106 N. Y. S. 921.

"Lands."— In 1905, an amendment was made to the equivalent section of the Liquor Tax Law adding the words "or lands" after the term "premises," and it was held that this did not change the meaning of the section, the term "premises" being deemed equivalent to "lands." Matter of Cullinan, (1906) 113 App. Div. 485, 99 N. Y. S. 374.

Function of certificate issuing officer.—As a rule a certificate issuing officer acts only in a ministerial capacity; and, if the application is in due form and does not disclose ground for refusing the certificate, he cannot utilize his own information that the premises are within half a mile of a poor house and refuse the certificate on that ground. People v. Macy, (1896) 1 Liq. Tax Law Rep. 82. And see supra, section 17, as to power of the certificate issuing officer.

Hotel near asylum.— When this section was originally enacted in 1896, the first subdivision did not contain the exceptions now contained therein, and it was held that an exception in the second subdivision in favor of hotels applied to hotels within half a mile of the institutions specified in subdivision 1. Matter of Salisbury, (1897) 19 Misc. 340, 44 N. Y. S. 291.

III. Churches and Schoolhouses

1. Construction in General

Construction of equivalent section of Excise Law of 1892.— Under the Excise Law of 1892, a person who had not been licensed prior to the passage of such act was forbidden to sell liquors in any building not used for hotel purposes within 200 feet of a building used exclusively as a church or schoolhouse. This provision was thought to be entitled to a liberal construction so as to protect such institutions against the evil effects of the saloon. People v. Murray, (1896) 5 App. Div. 441, 39 N. Y. S. 1130, 16 Misc. 398, 38 N. Y. S. 609. Thus, it was held that the privilege given of selling near a church or schoolhouse was personal to the licensee and did not pass to his successor in the premises. People v. Murray, (1898) 148 N. Y. 171, 42 N. E. 584. And, as no other person was qualified to traffic in liquors within the prescribed distance, such a license was not transferrable. Matter of Place, (1898) 27 App. Div. 561, 50 N. Y. S. 640, affirmed without opinion (1898) 156 N. Y. 691, 50 N. E. 1121.

Object and purpose of section.— In People v. Hamilton, (1898) 25 App. Div. 428, 49 N. Y. S. 605, the court, discussing the limitation against issuing certificates for premises within the prescribed distance of a church, said: "This statute was doubtless enacted under the police power of the State, and while its language should receive a just and reasonable construction, the object and intent of its enactment should not be lost sight of. The main object which the Legislature had in view was, of course, to confine the traffic in liquors within certain limits and to surround it with well-defined restrictions. One of these restrictions is that the church or the school shall not be brought into too close proximity to the saloon; hence the limitation of 200 feet. But while endeavoring to protect the church and the school from the demoralizing influence of the saloon, the Legislature was at the same time careful to recognize the fact that dealers in liquor might have certain vested rights which ought not to be interfered with, and, therefore, it enacted that where at the time the law went into effect a party was lawfully engaged in the sale of liquors at any particular place, such traffic might be continued at that place, although it was within the prohibitory terms of the statute. This exception was manifestly designed to protect parties who, under the sanction of former statutes, had incurred the

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trouble and expense of buying, renting or fitting up places in which to conduct the saloon business."

Rule of construction.— Subdivision two of this section relative to keeping the liquor traffic a certain distance from schools and churches, is liberally construed in favor of such institutions. Matter of Lyman, (1900) 48 App. Div. 275, 62 N. Y. S. 846; Matter of Lewis, (1899) 26 Misc. 532, 57 N. Y. S. 676. See also Matter of Clement, (1907) 54 Misc. 352, 105 N. Y. S. 1054; Matter of Brady, (1907) 106 N. Y. S. 921.

Subdivision two "is to be liberally construed to give full effect to the beneficent purpose for which it was enacted, which is the protection of the church and school from the influences of the saloon." Matter of Zinzow, (1896) 18 Misc. 653, 43 N. Y. S. 714. "The courts have uniformly held that the exceptions in respect to churches and schools should be liberally construed in their favor and strictly against applicants for licenses within the prescribed distance and so as to prevent the mischief aimed at by the limitation." Matter of Place, (1898) 27 App. Div. 561, 50 N. Y. S. 640, affirmed without opinion (1898) 156 N. Y. 691, 50 N. E. 1121. But while "the Liquor Tax Law should be liberally construed in favor of schools, churches and homes, and the liquor trafficker strictly held to the provisions which permit him to carry on such business in our midst, yet the court is bound to give those provisions a reasonable interpretation and not construe them beyond their fair meaning or extend prohibitions to cases and situations which the law has not covered. In other words, the court can and should merely declare and enforce what the statute has enacted." Matter of Finley, (1908) 58 Misc. 639, 110 N. Y. S. 71.

Consent to traffic near schoolhouse.— The statute does not allow the issuance of a certificate within 200 feet of a schoolhouse upon consent, but forbids the issuance of the certificate, subject to the exceptions mentioned in the statute, so long as the schoolhouse exists. Matter of Farley, (1914) 84 Misc. 594, 147 N. Y. S. 859, affirmed 163 App. Div. 953, 148 N. Y. S. 1115, affirmed (1914) 212 N. Y. 591 mem.

2. Exemption in Favor of Certain Premises

Hotel prior to 1896.— If premises were occupied as a hotel on March 23, 1896, a certificate for traffic therein may be issued, though the premises are within 200 feet of a church or schoolhouse. Matter of Johnston, (1897) 1 Liq. Tax Law Rep. 167.

Hotel erected since 1896.— The exemption in favor of certain hotels within the prescribed distance from a church or schoolhouse, does not apply to those erected since March 23, 1896. Matter of Place, (1898) 27 App. Div. 561, 50 N. Y. S. 640, affirmed without opinion (1898) 156 N. Y. 691, 50 N. E. 1121.

Effect of subsequent erection of church.— Under subdivision 2 as it read in 1909, it was held that the subsequent erection of a church within 200 feet of premises for which a certificate had first been issued since March 23, 1896, would preclude the issuance of another certificate for such premises. Matter of Hering, (1909) 133 App. Div. 293, 117 N. Y. S. 747, affirmed (1909) 196 N. Y. 218, 89 N. E. 450; Matter of Clement, (1907) 57 Misc. 47, 107 N. Y. S. 205.

Traffic before 1896.—If in a proceeding to revoke a liquor tax certificate on the ground that the premises are within 200 feet of a church, the parties stipulate that the premises have been regularly licensed and occupied continuously as a saloon for the sale of liquor for at least ten years before 1898, they have brought the case within the exception provided in this section, and the proceeding must be dismissed. Matter of McCusker, (1898) 23 Misc. 446, 51 N. Y. S. 281.

Abandonment of hotel exemption.—The exemption in favor of buildings occupied as hotels on March 23, 1896, is lost if the use of the premises as a

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hotel is abandoned. Matter of Lyman, (1898) 29 App. Div. 390, 49 N. Y. S. 559, 52 N. Y. S. 1145. If a town votes against the issuance of certificates, but thereafter reverses its decision, a hotel occupied as such on March 23, 1896, can receive a certificate, though it is within 200 feet of a church. Op. Atty.-Gen. (1905) 541.

Abandonment of saloon traffic.—The exemption in favor of saloons within 200 feet of churches and schoolhouses on March 23, 1896, is lost if traffic in liquors at the premises is abandoned. Matter of Zinzow, (1896) 18 Misc. 653, 43 N. Y. S. 714. Where the business of one proprietor is closed up and there is no resumption thereof attempted by his successor for sixty days, the privilege may be regarded as surrendered. People v. Hamilton, (1898) 25 App. Div. 428, 49 N. Y. S. 605, reversing 21 Misc. 375, 47 N. Y. S. 190.

Where premises have not been used for the liquor traffic for fifteen months and during a portion of that time the premises were vacant, and during the balance were used for a small store, the privilege of trafficking in liquors within 200 feet of a schoolhouse is lost. Matter of Lewis, (1899) 26 Misc. 532, 57 N. Y. S. 676. Where there has been an actual abandonment of traffic for a period of eighteen months, a certificate cannot be granted for premises within 200 feet of a schoolhouse; and the mere fact that the fixtures used in the business are not removed, and that the person who owned a chattel mortgage on such fixtures has foreclosed the mortgage and has been in possession of the premises during the period of eighteen months, is not such a continuance of the business as to keep the exemption alive. Matter of Lyman, (1898) 34 App. Div. 389, 54 N. Y. S. 294. A brief interruption of traffic such as for domestic bereavement, might be disregarded on the question whether the premises have been continuously occupied for the liquor traffic; but, if they have been closed for over a year while the owner is looking for a purchaser, the privilege given by the statute is lost. Matter of Lyman, (1898) 1 Liq. Tax Law Rep. 390.

3. What Constitutes a Church

Church in process of construction.—A church lot upon which the church society has erected the foundation for a church structure, is not a "building occupied exclusively as a church," within the meaning of this section. People v. Lammerts, (1896) 18 Misc. 343, 40 N. Y. S. 1107, affirmed 14 App. Div. 628, 43 N. Y. S. 1161, affirmed (1900) 162 N. Y. 595 mem. A church in the process of construction, but not yet ready for occupancy, is not a bar to the issuance of a certificate for traffic at premises within 200 feet thereof. Matter of Rupp, (1907) 54 Misc. 1, 105 N. Y. S. 467.

Mission house.— Under the Excise Law of 1892, it was held that the "Florence Mission," a mission house for the reformation of fallen women, unconnected with any church and having no clergyman or pastor, was not a church. People v. Dalton, (1894) 9 Misc. 249, 30 N. Y. S. 407.

Church erected to defeat application.—A structure ten by sixteen feet, erected solely to defeat an application for a certificate, is not a building occupied exclusively as a church within the meaning of the statute, though it is used occasionally by a voluntary unincorporated religious association, which has large and convenient quarters elsewhere. Matter of Vail, (1902) 38 Misc. 392, 77 N. Y. S. 903. A small building hastily put up and leased to a church for the purpose of preventing certain nearby premises from being licensed as a hotel, is not a church within the meaning of the statute. Matter of Cruikshank, (1903) 3 Liq. Tax Law Rep. 93.

Creed or tenets.— It is not necessary that a religious society should be incorporated; nor is it necessary that it should hold to any particular tenets or creed, and great liberality and tolerance is given in the organization of religious societies and the promulgation of religious beliefs. Matter of Lyman, (1898) 29 App. Div. 390, 49 N. Y. S. 559, 52 N. Y. S. 1145.

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Use by societies.—A building used as a Jewish synagogue, consisting of two stories, the upper story being used exclusively for the religious services of the church, and the lower story for the Sunday school and for the meetings of several Jewish societies which are of a sectarian but not of a religious character, is within the statute a "building occupied exclusively as a church." Matter of McCusker, (1900) 47 App. Div. 111, 62 N. Y. S. 201; Matter of McCusker, (1898) 23 Misc. 446, 51 N. Y. S. 281. The fact that a church contains rooms for a parochial school and for church meetings and entertainments and that various associations and societies connected with the work of the church meet in such rooms, does not make the structure any the less a "building occupied exclusively as a church." Matter of Zinzow, (1896) 18 Misc. 653, 43 N. Y. S. 714.

Church entertainment buildings.— Subdivision 2, when referring to churches, contemplates buildings which are used for actual religious services; not buildings used solely for entertainments incidental to the church; and the subsequent use of the building for public worship does not invalidate a certificate granted before such use was commenced. Matter of Rupp, (1907) 55 Misc. 313, 106 N. Y. S. 483.

Living apartments in building.—Where a frame building was built for a dwelling-house, and the parlor floor is used for the services of a church and Sunday school, while the pastor with his family lives on the second floor, keeping house with the usual accommodations and conveniences for that purpose, and the third floor is occupied by a woman with her children who looks after the work to be done on the premises, it cannot be considered as used "exclusively" for church purposes within the meaning of this section. Matter of Finley, (1908) 58 Misc. 639, 110 N. Y. S. 71. But a church edifice may be deemed exclusively used as a church, although a pastor or a janitor or other officer resides therein. People v. Murray, (1895) 14 Misc. 177, 35 N. Y. S. 463.

4. What Constitutes a Schoolhouse

School house used for meetings of societies.—The fact that charitable, religious and temperance societies occasionally meet in a room in a school building, which is built for and devoted to school purposes, does not deprive the building of its general character as a schoolhouse. Matter of Lyman, (1900) 48 App. Div. 275, 62 N. Y. S. 846. And the mere fact that boys are allowed to meet in a school building at night as a sort of a club or association to keep them off the streets, does enable the court to say that the building is not used exclusively for school purposes. Matter of Wilson, (1901) 2 Liq. Tax Law Rep. 452.

Training school for nurses.—A training school for nurses maintained by a hospital is not a "schoolhouse" within the meaning of the statute. Matter of Townsend, (1909) 195 N. Y. 214, 88 N. E. 41, 16 Ann. Cas. 921, 22 L. R. A. (N. S.) 194, wherein it was said: "No one can consent to the conduct of the liquor traffic in any place within two hundred feet of a schoolhouse. This phase of the statute indicates that the legislature, in using the term 'schoolhouse,' had in view primarily the common public schools devoted to such general elementary and intermediate instruction as is adapted to the education of our children and youth; and perhaps secondarily such semi-public and private schools as are conducted for the same purpose. Broadly classified this includes all 'schoolhouses' in which our so-called grammar and high schools are conducted. While we can find no express warrant in the words of the statute for placing private and semi-public schools in the same category with common public schools, we are satisfied that it was not the intention of the legislature to exclude the former from its wholesome protection. That is the utmost limit, however, to which the language of the statute can be extended."

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Living apartments in school.—A schoolhouse is not given any other character by the mere fact that the teachers, or some of them, reside therein. People v. Murray, (1896) 148 N. Y. 171, 42 N. E. 584. And the circumstance that seven persons, not teachers in the school, live in the building and pay their board, where such persons are teachers by profession and members of a brotherhood by which the building is owned and the school conducted, does not make it any the less a schoolhouse. People v. Murray, (1896) 5 App. Div. 441, 39 N. Y. S. 1130, 16 Misc. 398, 38 N. Y. S. 609.

School entertainments.— In the absence of evidence that dances and entertainments in a school are not for educational purposes or incidental thereto, a certificate issued for traffic within 200 feet of the school will be revoked. Matter of Lyman, (1898) 1 Liq. Tax Law Rep. 390.

5. *Manner of Measurement*

Straight line.—The measurement of 200 feet is to be taken in a straight line disregarding intervening buildings and the line of the road or the route which would be taken in passing from one building to the other. Matter of Lewis, (1899) 26 Misc. 532, 57 N. Y. S. 676. "A straight line is one free from angularities or curvatures, and is the shortest and most direct distance between two points." Matter of McCusker, (1898) 23 Misc. 446, 51 N. Y. S. 281. Thus, where the liquor premises are on a corner adjoining a church, but the entrance thereto is around the corner from the church, the measurement is not to be taken around the corner, but straight through the liquor premises. Matter of McCusker, (1898) 23 Misc. 446, 51 N. Y. S. 281.

Premises on corner.—Within the meaning of subdivision 2 of this section, premises which are on a corner are on both streets; and, if the entrance to the premises is within 200 feet of the entrance to a church, a certificate may not be issued for such premises though the entrance is around the corner from the church and thus on a different street. Matter of Zinzow, (1896) 18 Misc. 653, 43 N. Y. S. 714; Matter of McCusker, (1898) 23 Misc. 446, 51 N. Y. S. 281. This is the same doctrine as was applied in the construction of provisions of the Excise Law of 1892 relative to liquor premises within 200 feet of a school or church. People v. Murray, (1896) 5 App. Div. 441, 39 N. Y. S. 1130, 16 Misc. 398, 38 N. Y. S. 609.

Liquors sold in room on upper story.— Under the Excise Law of 1892 which prohibited the traffic within 200 feet of a school, it was held that where an applicant desired to sell liquors on the fifth floor of an apartment store, the measurement of 200 feet was to be taken from the street entrance, not the entrance to the room on the fifth floor. People v. Murray, (1896) 5 App. Div. 66, 38 N. Y. S. 903.

Locked door as an entrance.— Under the Excise Law of 1892 which prohibited the traffic in liquors within 200 feet of a school, it was held that a door which was closed and locked was nevertheless an "entrance" to be considered in making the measurement. Matter of Macy, (1896) 5 App. Div. 70, 38 N. Y. S. 1146.

Temporary change in entrance.—Where the main entrance to a place wherein it is sought to traffic in liquors is within 200 feet of the entrance to a church, the maintenance of show windows across such main entrance, in such a manner as to constitute merely a temporary closing of such entrance, and the use of an entrance on another street more than 200 feet from the church, may be considered a mere evasion of the law so that the applicant for a certificate will be required to procure the consent of such church. Matter of Finley, (1908) 58 Misc. 639, 110 N. Y. S. 71.

Addition to premises bringing entrance within 200 feet of church.—Where the entrance of premises in which traffic in liquor is carried on is beyond the prescribed distance from a church or schoolhouse, the certificate holder cannot

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make an addition to the premises with an entrance within the prescribed distance so as to become entitled to sell liquors in the united structure. Matter of Place, (1898) 27 App. Div. 561, 50 N. Y. S. 640, affirmed without opinion, (1898) 156 N. Y. 691, 50 N. E. 1121.

IV. Premises Certificate for Which Has Been Revoked

Constitutionality.—The provisions of subdivision 4 of this section prohibiting the issuance of a new certificate for one year after the revocation of a certificate upon certain grounds, are valid. Matter of Farley, (1912) 151 App. Div. 456, 135 N. Y. S. 869; Matter of Clement, (1910) 141 App. Div. 139, 126 N. Y. S. 227; People v. McKee, (1908) 59 Misc. 369, 112 N. Y. S. 385.

Change in law.— In 1907, it was the law that when a liquor tax certificate was canceled because of the conviction of the holder for keeping a disorderly house, the holder could not have another license for one year, but a new certificate could be issued to any one except herself, any member of her family, or agent, servant, employee or any other person representing her; but the statute was changed by chapter 144 of the Laws of 1908, so that a new certificate cannot be issued for the premises to any one for one year after the cancellation of the certificate. Teti v. West End Brewing Co., (1910) 140 App. Div. 16, 124 N. Y. S. 1.

Conviction of employee.— Under the statute as it read in 1908, it was held that the fact that an employee of the certificate holder was convicted of a violation of the law and the certificate was thereupon revoked, did not bar the issuance within a year of a new certificate for the same premises to the same holder. People v. McKee, (1908) 59 Misc. 368, 112 N. Y. S. 338.

Injunction against traffic under new certificate.—Where a certificate has been canceled because the holder has permitted the premises to become disorderly, and a new certificate is issued to another person within one year contrary to the terms of subdivision 4 of this section, traffic under the new certificate may be enjoined under section 28. Matter of Farley, (1912) 149 App. Div. 637, 134 N. Y. S. 397.

Continuation of certificate after termination for purposes of cancellation.— Subdivision 4 of this section does not indicate a legislative intention to continue a certificate after its time limitation for the purpose of canceling the same and thus penalizing the premises. Matter of Farley, (1915) 214 N. Y. 212, 108 N. E. 417; Matter of Farley, (1914) 87 Misc. 25, 149 N. Y. S. 307. But the fact that the certificate is forfeited under section 36 by reason of the conviction of employees, does not bar a proceeding for the cancellation of the certificate on the ground that the premises have become disorderly. Matter of Farley, (1914) 164 App. Div. 802, 150 N. Y. S. 300. And see infra, section 27, as to the time cancellation proceedings must be brought.

Conviction after expiration of certificate.—The conviction of the holder of a liquor tax certificate for permitting the premises to become disorderly, attaches the statutory disqualification to the premises for a year from such conviction, though the conviction is not had until after the expiration of the certificate. Matter of Farley, (1915) 170 App. Div. 164, 155 N. Y. S. 869. And see also Matter of Farley, (1912) 151 App. Div. 456, 135 N. Y. S. 869.

Revocation of certificate within 200 feet of schoolhouse.— In 1914, when subdivision 4 formed a part of section 15 of the Liquor Tax Law, the last proviso was not a part thereof; and it was held that; where a certificate for traffic within 200 feet of a schoolhouse was canceled by reason of a conviction for keeping a disorderly house, a new certificate could not be issued after the expiration of the year, though the premises were used for the liquor traffic prior to March 23, 1896. Matter of Farley, (1914) 84 Misc. 594, 147 N. Y. S. 859, affirmed 163 App. Div. 953, 148 N. Y. S. 1115, affirmed (1914) 212 N. Y. 591 mem.

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§ 24. Surrender and cancellation of liquor tax certificate; payment of rebates; notice to police officials. 1. If a person holding a liquor tax certificate and authorized to sell liquors under the provisions of this chapter, against whom no complaint, prosecution, action or proceeding[1] is pending on account of any violation thereof, and who shall not have violated any provision of this chapter during the excise year for which such certificate was issued, shall voluntarily, and before arrest or indictment for a violation of this chapter, cease to traffic in liquors during the term for which the tax is paid under such certificate, such person or his duly authorized attorney may surrender such tax certificate to the officer who issued the same or to his successor in office provided that such tax certificate shall have at least one month to run at the time of such surrender; and provided that no rebate shall be allowed or paid upon the surrender and cancellation of a certificate issued under subdivisions three, five, six or seven of section eight of this chapter, and provided further, that the rebate thereon shall be computed for full months, less fifteen dollars, on any certificate issued before the passage of this act, and on any certificate thereafter issued in an amount equal to one-half of the tax for the balance of the excise year,[2] commencing with the first day of the month succeeding the one in which such certificate is surrendered, unless such surrender be on the first day of the month; and at the same time shall present to such officer a verified petition setting forth all facts required to be shown upon such application;[3] and, except in the case of a certificate issued under * subdivision four of section eight of this chapter, a consent in writing duly executed and acknowledged by any person to whom such certificate may have been transferred or assigned as collateral security for moneys loaned or any other obligation incurred. Said officer shall thereupon compute the amount of rebate then due on said certificate for the unexpired term thereof, and shall execute duplicate receipts therefor showing the name of the person to whom such certificate was issued, the number thereof, date when issued, amount of tax paid therefor, and the date when surrendered for cancellation, together with the amount

* So in original.

1 Words "or proceeding," added by L. 1910, ch. 503.

2 Words "on any certificate thereafter issued in an amount equal to one-half of the tax for the balance of the excise year," added by L. 1910, ch. 503.

3 Remainder of sentence added by L. 1911, ch. 408.

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of rebate due thereon at such date as computed by him, the name of the person entitled to receive the rebate, the locality liable for one-half of such rebate, and the name and title of the fiscal officer thereof. One of such receipts said officer shall deliver to the person entitled thereto, and the other of such receipts he shall immediately transmit, with the surrendered certificate and the petition for the cancellation thereof, to the state commissioner of excise. If within thirty days from the date of the receipt of such certificate by the state commissioner of excise, the person surrendering such certificate shall be arrested or indicted for a violation of this chapter, or proceedings shall be instituted for the cancellation of such certificate, or an action shall be commenced against him for penalties, such petition shall not be granted until the final determination of such proceedings or action; and if the said petitioner be convicted, or said action or proceedings be determined against him, said certificate shall be canceled and all rebate thereon shall be forfeited.[1] If the holder of said certificate, authorized to sell liquors under the provisions of this chapter, shall have ceased to traffic in liquors upon the surrender of said certificate and no complaint, prosecution, action or proceeding shall be pending against him on account of any violation of this chapter and he shall not have violated any provision of this chapter during the excise year for which such certificate was issued,[2] the state commissioner of excise shall prepare two orders for the payment of such rebate, one order for the one-half thereof, directed to the state treasurer, to be paid by him, on the certificate of the comptroller, and one order for the one-half of such rebate, directed to the fiscal officer of the proper locality, to be paid by such fiscal officer out of any excise or other moneys of such locality applicable thereto. If he have no such moneys of such locality in his possession or under his control, then the said fiscal officer shall at once borrow enough money upon the credit of the locality, and he is hereby authorized so to do, to pay said order, and shall pay the same. The money so borrowed shall be a lawful claim against such locality, to be paid as are other legal claims. The aforesaid orders, or the order on the said fiscal officer and the check of the state treasurer for said one-half of

1 Words "but if such petitioner be acquitted, and such proceedings or action against him be dismissed on the merits then," omitted by L. 1910, ch. 503.

2 Sentence to here added by L. 1910, ch. 503.

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such rebate moneys, shall be transmitted to the officer who issued such canceled certificate, or to his successor in office, to be delivered to the holder of the duplicate receipt upon the surrender of such receipt, which receipt shall be immediately transmitted to the said state commissioner. Any rebate moneys due on the cancellation of certificates issued by the state commissioner of excise under subdivision four of section eight of this chapter shall be paid by the state treasurer from any moneys applicable thereto, on the certificate or check of the state commissioner of excise, countersigned by the comptroller. If a corporation, association or copartnership holding a liquor tax certificate shall be dissolved, or a receiver or assignee be appointed therefor or a receiver, assignee or committee of the property of a person holding a liquor tax certificate be appointed during the time for which such certificate was granted, or a person holding a liquor tax certificate shall die during the term for which such tax certificate was given, such corporation, association, copartnership or receiver or assignee, or the administrator, or executor of the estate of such person, or the person or persons who may succeed to such business, or a committee of the property of a person adjudged to be incompetent, may in like manner surrender such liquor tax certificate; or they may continue to carry on such business, upon such premises, for the balance of the term for which such tax was paid and the certificate given, with the same right and subject to the same restrictions and liabilities as if such persons had been the original applicants for and the original owners of such liquor tax certificate, upon filing a statement and bond, as provided by sections fifteen and sixteen of this chapter, and, except in the case of a certificate issued under subdivision four of section eight of this chapter, a consent in writing executed and acknowledged by any person to whom such certificate may have been transferred or assigned as collateral security for moneys loaned or any other obligation incurred,[1] and not otherwise; but the liquor tax certificate under which such business is carried on shall have written or stamped across the face of the same, over the signature of the officer who issued the same or his successor in office, the words "(here insert the name of the person) is permitted to traffic in liquor as (here insert the representative capacity whether as

[1] Words "and, except in the case . . . obligation incurred," added by L. 1911, ch. 408.

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assignee, receiver, executor, administrator or otherwise) of the original owner of this certificate for the unexpired term thereof."

2. It shall be the duty of any special deputy commissioner of excise or county treasurer, to whom a liquor tax certificate is surrendered for cancellation and rebate, to immediately serve a written or printed notice upon the commissioner of police, chief of police, or chief police officer of the city, borough or village in which the place for which the surrendered certificate was issued is situated, or upon the sheriff of the county and a constable of the town, in case the certificate was issued for a place situated in a town and not within any city, borough or village, which notice shall include a statement of the number of the surrendered certificate, the name and place of residence of the holder of the certificate,[1] the location of the place for which the certificate was issued or to which it has been transferred, and was held at the time of surrender by street and number, if any, otherwise such apt description as will definitely locate the premises; the fact that such liquor tax certificate has been surrendered; that the traffic in liquors at said premises by any one is not authorized until a new certificate has been obtained therefor; and the date when such certificate was surrendered for cancellation. Such notice may be served by mail, by inclosing the same in a post-paid sealed envelope, duly addressed to such officer and shall be forwarded by registered letter. The special deputy commissioner or county treasurer making such service shall forward to the state commissioner of excise a copy of the notice served, with proof of service thereof, and shall attach thereto the registry receipt of the officer to whom addressed as soon as the same is received.

3. In case any person legally entitled to receive a liquor tax certificate under the provisions of this chapter, shall have already paid, or shall hereafter pay a sum therefor in excess of the amount required by section eight, such person or his legal representative or assigns, may present to the state commissioner of excise such proof of the payment of such excess as the state commissioner of excise may require, the date thereof, the original assignment, if any, of the claim to such excess, and a release of all claims thereon against the state of New York, the special deputy commissioner of excise or the county treasurer of the county, and the locality in

[1] Words "at the time of surrender," omitted by L. 1910, ch. 503.

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which such trafficking was carried on. Upon the determination by the state commissioner of excise of the justice and validity of said claim, the state commissioner of excise is hereby authorized and directed to issue and deliver to such person, his legal representative or assigns, two orders for the payment of such excess, one order for such portion thereof as was received by the state, directed to the state treasurer, to be paid by him on the warrant of the comptroller, and one order for such portion thereof as was received by the locality where such trafficking in liquors was carried on, directed to the fiscal officer of such locality, to be paid by such fiscal officer out of excise or other moneys of said locality applicable thereto. If the said fiscal officer have no such moneys of such locality in his possession or under his control, then the said fiscal officer shall at once borrow enough money upon the credit of the locality, and he is hereby authorized so to do, to pay said order, and shall pay the same. The money so borrowed shall be a lawful claim against such locality, to be paid as are other legal claims. That portion of the excess which was received by the state, shall be a charge upon and be paid out of the moneys appropriated for rebates.

This section was derived from the Liquor Tax Law of 1896, § 25, as amended by L. 1897, ch. 312, § 17; L. 1900, ch. 367, §§ 7, 8; L. 1903, ch. 115, § 3; L. 1903, ch. 486, § 11, and L. 1908, ch. 46. It was amended by L. 1910, ch. 503, § 4, and L. 1911, ch. 408. The amendments are given in the footnotes.

Section 24 of the Liquor Tax Law of 1896 is now covered by section 23.

Application for certificate: see supra, § 16. *Bond accompanying application for certificate:* see supra, § 16. *Issuance of certificate:* see supra, § 17. *Revocation of certificate:* see infra, § 27. *Forfeiture of certificate:* see infra, § 36. *State commissioner to be made party to all actions and proceedings relative to transfer and surrender of certificates:* see supra, § 3.

Recovery of unearned liquor-license fee: see 16 L. R. A. (N. S.) 512 note. *Recovery of unearned liquor license fee upon revocation of license for misconduct of licensee:* see 45 L. R. A. (N. S.) 593 note. *Right of liquor licensee to recover fee paid where license fails without his fault:* see 17 Ann. Cas. 187 note.

Contractual right to rebate.—"The right to a rebate is to be construed as resting upon a contract between the licensee and the State." People v. Clement, (1909) 134 App. Div. 462, 119 N. Y. S. 374.

Rebate on additional tax.—No rebate is allowable on the additional one-quarter raise in the license fee provided for by L. 1915, ch. 672. Op. Atty.-Gen. (1915) 456.

Exclusiveness of statutory remedy.—The only right of a certificate holder to a rebate is under this section, and it cannot be obtained except within the strict terms thereof. Matter of Seitz, (1900) 32 Misc. 108, 65 N. Y. S. 462; affirmed 59 App. Div. 172, 69 N. Y. S. 111.

Necessity of physical surrender of certificate.—A receiver of a judgment debtor who is the holder of a certificate, is not in a position to secure the

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rebate unless he can make a physical surrender of the certificate. People v. Hilliard, (1896) 1 Liq. Tax Law Rep. 99.

Conditions precedent to rebate in general.—The provisions of this section impose certain conditions to the attaching of the right to the rebate; these conditions imposed are conditions precedent and the property right to a rebate does not attach if there is an arrest or indictment or other prosecution provided for in the section pending at the time of the surrender or within thirty days thereafter. People v. Cullinan, (1901) 168 N. Y. 258, 61 N. E. 243. "To entitle the holder to the rebate there are certain conditions precedent, the fulfillment of which must be completed at the time of the surrender, and being conditions precedent their fulfillment must be alleged and the burden of establishing them is upon the certificate holder. These conditions are as follows: First, there must be no complaint, prosecution or action pending on account of a violation of the Liquor Tax Law; second, the person surrendering must not have violated any provision of the Liquor Tax Law during the excise year for which this certificate was issued; third, the certificate must be surrendered before arrest or indictment for a violation of the Liquor Tax Law; fourth, the person surrendering must have ceased to traffic in liquors during the term for which the tax was paid." People v. Clement, (1907) 117 App. Div. 539, 102 N. Y. S. 779.

Pending prosecution.—The property right to a rebate does not attach if there is a prosecution pending at the time of the surrender of the certificate or within thirty days thereafter, and an assignee of the certificate has no greater right to the rebate than the original holder, notwithstanding the prosecution is for an offense against the law committed by the latter. Matter of Cullinan, (1903) 87 App. Div. 47, 83 N. Y. S. 1025.

Nonviolation of law as condition precedent to rebate.—The right to a rebate is not an absolute property right in any holder who surrenders his certificate, but is a qualified right which is lost by a violation of the law. Matter of Lyman, (1901) 59 App. Div. 217, 69 N. Y. S. 309. "The right to a rebate depends upon the fundamental fact that the holder of a liquor tax certificate shall not have violated any of the provisions of the Liquor Tax Law during the year for which it was issued." People v. Clement, (1909) 134 App. Div. 462, 119 N. Y. S. 374. Moreover, the right to a rebate under this section is not dependent upon the nonexistence of an indictment, complaint, prosecution, action or other proceeding for a violation of the Liquor Tax Law at the time that the certificate is surrendered. On the contrary by the express provisions of this section, such condition must not only exist at the time of the surrender, but it is also required that the holder "shall not have violated any provision of the Liquor Tax Law during the excise year for which such certificate was issued." By the terms of the statute, therefore, it is made a condition precedent that there shall have been no violation of the Liquor Tax Law during the excise year for which the certificate was issued, and no violations prior to the time when the holder ceases to traffic in liquor. People v. Cullinan, (1904) 95 App. Div. 598, 88 N. Y. S. 1022.

Violation by one member of firm.—The violation of the law and consequent arrest of one member of a firm to which a certificate was issued, suspends the right to a rebate until the acquittal of such accused. People v. Lyman, (1898) 156 N. Y. 407, 50 N. E. 1112, affirming 27 App. Div. 527, 50 N. Y. S. 497.

Violation by employee.—A licensee, on surrendering his certificate, is not entitled to a rebate if he has violated any provision of the Liquor Tax Law. It is not necessary that he be personally guilty of the violation; he may be liable for a violation by his employee so that he shall receive no rebate, and this is true though section 36, subdivision 3, provides that two violations shall forfeit a certificate and right of rebate. People v. Clement, (1909) 134 App. Div. 462, 119 N. Y. S. 374, reversing 63 Misc. 369, 116 N. Y. S. 1098. See also, People v. Cullinan, (1903) 41 Misc. 404, 84 N. Y. S. 1018, affirmed without opinion 90 App. Div. 606, 85 N. Y. S. 1142.

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Violation before issuance of certificate.— Under the equivalent section of the Liquor Tax Law of 1896, as it read in 1901, it was held that if, at the time of the surrender of a certificate or within thirty days thereafter, a proceeding was pending against the holder for a violation of the statute, and such proceeding resulted in a conviction, the holder was not entitled to any rebate, though the violation which was the basis of the prosecution was committed before the issuance of the certificate. People v. Cullinan, (1901) 168 N. Y. 258, 61 N. E. 243. And it was held that an assignee of a certificate holder was not entitled to recover the rebate if at the time of the surrender the original holder was under indictment for a violation of the Liquor Tax Law, though such violation was committed while the assignor held a different certificate. People v. Lyman, (1901) 59 App. Div. 172, 69 N. Y. S. 111, affirming 32 Misc. 108, 65 N. Y. S. 462. Where a liquor tax certificate was issued to one then under indictment for a violation of the law while a bartender for another, and thereafter he was convicted of the crime charged, it was held that neither he nor his assignee was entitled to a rebate on the surrender of the certificate. People v. Clement, (1908) 128 App. Div. 539, 112 N. Y. S. 951, reversing 58 Misc. 631, 111 N. Y. S. 1033.

Conviction before certificate goes into force.—Where a certificate was issued April 25th to go into effect May 1st, it was held that an assignee thereof might surrender the same and receive the rebate, though the holder was convicted on April 26th of a violation of the Liquor Tax Law. People v. Lyman, (1898) 25 Misc. 217, 55 N. Y. S. 76.

Certificate issued to one convicted of felony.—Where a certificate has been issued to one convicted of a felony, it is void under section 21, and an assignee thereof cannot surrender the same and recover the rebate. People v. Lyman, (1900) 33 Misc. 243, 68 N. Y. S. 331.

Continuation of traffic after surrender.—Trafficking in liquors after the surrender of the certificate and within the term for which the tax was paid, is sufficient to defeat a claim for the recovery of the rebate, though no prosecution has ever been instituted on account of such violation. People v. Lyman, (1902) 69 App. Div. 406, 74 N. Y. S. 1104, affirmed (1903) 173 N. Y. 604, 66 N. E. 1114. A sale of liquor by the certificate holder after the surrender of the certificate forfeits his right to the rebate. Matter of Cullinan, (1906) 114 App. Div. 509, 99 N. Y. S. 1119; Matter of Lyman, (1899) 26 Misc. 300, 56 N. Y. S. 1020; Matter of Cullinan, (1902) 2 Liq. Tax Law Rep. 639. Where an assignee of a certificate has taken it and surrendered it and applied for a rebate, a subsequent sale of liquors on the premises made by the original holder forfeits the rebate and requires the cancellation of the certificate. Matter of Michell, (1899) 41 App. Div. 271, 58 N. Y. S. 632.

Acquittal of certificate holder.— Prior to 1910, this section contained a clause that if the petitioner should be acquitted of a violation of the law or if the proceedings or action against him be dismissed upon the merits, the rebate should be paid. When such was the condition of the statute, it was held that an order of discharge by a city magistrate of the city of New York, reciting a determination that there was not sufficient cause to believe the accused person guilty of a violation of the Liquor Tax Law, was a dismissal of the proceeding within the meaning of this section. People v. Lyman, (1902) 69 App. Div. 406, 74 N. Y. S. 1104, affirmed without opinion (1903) 173 N. Y. 604, 66 N. E. 1114; People v. Lyman, (1900) 53 App. Div. 470, 65 N. Y. S. 1062, affirmed without opinion (1901) 168 N. Y. 669, 61 N. E. 1133; People v. Lyman, (1900) 2 Liq. Tax Law Rep. 264.

Acquittal of employee.—Where the only claim of a violation of law is an alleged offense for which an employee has been acquitted by a jury or the charge has been dismissed by the grand jury, the holder is entitled to a rebate on surrender of the certificate, and the commissioner of excise cannot prove such offense as a bar to the proceeding. People v. Clement, (1910)

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139 App. Div. 502, 124 N. Y. S. 102, reversing (1910) 67 Misc. 527, 124 N. Y. S. 748; People v. Clement, (1910) 139 App. Div. 508, 124 N. Y. S. 106.

Denial that petitioner was duly acquitted.—Where a writ of mandamus has been issued to compel the commissioner of excise to issue two orders for the payment of the rebate, a denial in the return that the original certificate holder was duly tried and discharged, is not a sufficient denial of a question of fact, but is a mere legal conclusion that the discharge was not in accordance with law. People v. Lyman, (1902) 69 App. Div. 399, 74 N. Y. S. 1106.

Proceeding for revocation after thirty days.—The thirty day period specified in this section is merely a suspension of the right to the payment of the rebate, and is not a limitation for the commencement of proceeding to revoke a certificate; and a party surrendering a certificate is not entitled to a rebate if he has violated the law, though a proceeding for the revocation of the certificate is not commenced until the expiration of the thirty day period. Clement v. Viscosi, (1909) 63 Misc. 514, 118 N. Y. S. 613.

Transmission of duplicate receipts to commissioner as condition precedent.—The making and execution of duplicate receipts and transmission of one thereof to the commissioner of excise with the certificate is a condition precedent to the granting by the commissioner of an order for the payment of rebate; and the commissioner will not be compelled by mandamus to issue such order where the conditions precedent have not been performed. People v. Lyman, (1898) 25 Misc. 217, 55 N. Y. S. 76.

Binding effect of receipts on commissioner of excise.—The execution of the duplicate receipts as provided in this section is not an adjudication of the truth of the statements contained in the petition of the certificate holder, and the commissioner of excise is not bound thereby. People v. Lyman, (1902) 67 App. Div. 446, 73 N. Y. S. 987, affirmed on opinion below (1903) 173 N. Y. 605, 66 N. E. 1114.

Peremptory writ of mandamus improper.—Where one surrendering a certificate applies for a writ of mandamus to compel the payment of the rebate and his petition admits one conviction of an employee for a violation of the statute, and the answer to the petition sets out a violation of the statute by the holder and his agents, a question of fact is raised, and the relator is entitled only to an alternative writ, and it is improper to grant a peremptory writ. People v. Clement, (1907) 117 App. Div. 539, 102 N. Y. S. 779.

Burden of proof.— On the trial of an issue raised by the return of a writ of alternative mandamus addressed to the commissioner of excise for the payment of rebate moneys, the burden is upon the petitioner to establish the truth of the allegations denied by the commissioner. People v. Lyman, (1902) 67 App. Div. 446, 73 N. Y. S. 987, affirmed on opinion below (1903) 173 N. Y. 605, 66 N. E. 1114.

Recovery of preliminary deposit by one not receiving certificate.—Where one makes a preliminary deposit for a liquor tax certificate, but fails to receive the same on account of his failure to make a proper application and file a bond, he cannot recover the deposit, as his failure to receive the certificate is due to his own neglect to comply with statutory requirements. Scalzo v. Sackett, (1900) 30 Misc. 543, 63 N. Y. S. 820.

Recovery of excess tax.—Where an applicant for a certificate has paid an excessive tax and thereafter he surrenders the certificate and receives a rebate certificate therefor, such certificate can be enforced only according to the provisions of this section, and the holder cannot maintain an action at law against the county treasurer to recover the excess tax. Ging v. Sherry, (1898) 32 App. Div. 354, 52 N. Y. S. 1003.

Restitution on reversal of order directing county treasurer to issue certificate.—Where a county treasurer refuses to issue a certificate, but his decision

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is reversed by a writ of certiorari, and the relator has paid the tax and secured a certificate, but on appeal by the county treasurer to the Appellate Division the order requiring the issuance of the certificate is reversed, the Appellate Division, under section 1323 of the Code of Civil Procedure, will order restitution to the holder of a pro rata amount of the tax. People v. Sackett, (1897) 15 App. Div. 290, 44 N. Y. S. 593.

Receiver in supplementary proceedings.—Where the certificate holder has surrendered the certificate, and thereafter before the payment of the rebate a receiver is appointed in supplementary proceedings against him, such receiver cannot procure an order directing the commissioner of excise to pay the rebate to him, for the commissioner does not hold the rebate moneys in his hands; but the commissioner may be required to issue an order for the payment of the rebate. Knapp v. Scanlin, (1902) 36 Misc. 756, 74 N. Y. S. 458.

Partnership certificate.—A liquor tax certificate which is the property of a firm, on the death of one member thereof goes to the surviving member as survivor. Matter of Lyman, (1901) 2 Liq. Tax Law Rep. 457.

Continuance of business by personal representative.—This section permits the personal representative to continue the business of a deceased certificate holder, but the representative must file a new statement and bond and procure the consent of the certificate issuing officer. Matter of Clement, (1907) 55 Misc. 615, 105 N. Y. S. 1085.

Neglect of administrator to collect surrender value.— An administrator who neglects to surrender a certificate held by a deceased at the time of his death, may be charged with the surrender value for the time of his neglect. Matter of McGovern, (1908) 118 N. Y. S. 378.

Right of assignee of certificate.—The right of an assignee of a certificate to a rebate upon its surrender is no greater than the right of the original holder; and, if the original holder was not in position to enforce the payment of the rebate, the assignee cannot do so. Matter of Cullinan, (1903) 87 App. Div. 47, 83 N. Y. S. 1025. And see, infra, section 26, as to the rights of assignees of certificates.

Fees deducted under section 11.—The fees allowed to the certificate issuing officer by section 11 are to be deducted from the amount of the tax, and the applicant is not concerned with them; and, when a refund is made, the applicant is entitled to a pro rata refunding of the whole amount paid for the certificate. Op. Atty.-Gen. (1896) 177.

Recovery under section 4 of Liquor Tax Law of 1896.— Section 4 of the Liquor Tax Law of 1896 provided that all licenses theretofore granted by a board of excise should cease from and after June 30, 1896, and permitted the holder of such a license to recover a rebate from the municipality granting the same. An action to recover such rebate was deemed an action on implied contract within the meaning of section 420 of the Code of Civil Procedure. Augner v. New York, (1897) 14 App. Div. 461, 43 N. Y. S. 803.

Cited.— In People v. Hageman, (1916) 174 App. Div. 715, 160 N. Y. S. 531, this section was cited as bearing on the seeming conflict between subdivision 9 of section 8 and section 25. See supra, § 8, note, IV. *Ratio of Certificates*, and § 25, note.

§ 25. Changing the place of traffic. If a person,[1] having paid a tax and holding a liquor tax certificate, shall desire to transfer to and carry on such business for which the liquor tax certificate was issued in other premises than those designated in the original

1 Words " corporation, association, copartnership or," omitted.

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application, and in the tax certificate, but in the same city, borough[1] or town, and in premises where such traffic is not prohibited by this chapter, upon the making and filing of a new application and bond in the form and as provided for in sections fifteen and sixteen of this chapter, and a consent in writing executed and acknowledged by any person to whom such certificate may have been transferred or assigned as collateral security for moneys loaned or any other obligation incurred,[2] and the presentation of the tax certificate, the officer who issued the same or his successor in office, shall write or stamp over his signature across the face of the certificate the words, "The traffic in liquors permitted to be carried on under this certificate is hereby transferred from (here insert the description of the original locality) to (here insert the description of the new locality)."

This section was derived from the Liquor Tax Law of 1896, § 26. It was amended to read as above by L. 1911, ch. 407, § 2. The amendments are given in the footnotes.

Section 25 of the Liquor Tax Law of 1896 is now covered by section 24.

State commissioner to be made party to all actions and proceedings relative to transfer of certificates: see supra, § 3.

Transfer as affected by amendment of section 8.— Subdivision 9 of section 8, supra, having been added after the enactment of section 25, and having been last amended by L. 1915, ch. 654 (erroneously cited in opinion as L. 1916, ch. 122), whereas section 25 was last amended by L. 1911, ch. 407, the provisions of subdivision 9 of section 8, as to enumeration and ratio, prevail over the provisions of section 25 as to the transfer from one place to another in the same town. People v. Hegeman, (1916) 174 App. Div. 715, 160 N. Y. S. 531. See supra, § 8, note, IV. *Ratio of Certificates.*

"Locality."—The terms "original locality" and "new locality" have been held to refer to the location of the premises, thus harmonizing this section with section 9, supra, limiting the issue of certificates according to certain ratios of inhabitants. People v. Hegeman, (1916) 174 App. Div. 715, 160 N. Y. S. 531.

Transfer as dependent on possession of premises.—"The right to transfer is not dependent upon the possession of the premises. The holder of a liquor tax certificate may transfer whether in or out of possession. The case must not be confused with those in which the applicant for a certificate never had the right of possession." In re Marshall, (1916) 97 Misc. 492, 160 N. Y. S. 698.

Two certificates for same premises.—While two certificates may be issued for traffic at the same premises, the law contemplates an entire abandonment of traffic at the premises before one of the certificates can be transferred to other premises under the Ratio Act. People v. Clement, (1911) 70 Misc. 587, 128 N. Y. S. 573. "The proper rule is that whenever two certificates have been originally issued for the same premises, neither can be transferred unless both are surrendered, but when one certificate has been issued for the premises and another certificate is thereafter transferred

[1] Word "borough" new.

[2] Words "and a consent in writing . . . obligation incurred," new.

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into the premises by abandonment of the traffic at other premises, then the first certificate may be transferred out." In re Marshall, (1916) 97 Misc. 492, 160 N. Y. S. 698, distinguishing People v. Masterman, (1913) 209 N. Y. 182, 102 N. E. 553. See also People v. Locatelli, (1910) 160 N. Y. S. 863.

§ 26. Voluntary sale of liquor tax certificate; changing the place of traffic.[1] The [2]person to whom any liquor tax certificate is issued, except a certificate issued under subdivisions three, five or six of section eight of this chapter, or his duly authorized attorney, may sell, assign and transfer such liquor tax certificate during the time for which it was granted to any person not forbidden to traffic in liquors under this chapter, nor under the subdivision of section eight under which such certificate was issued, who may thereupon carry on the business for which such liquor tax certificate was issued upon the premises described therein, if such traffic is not prohibited therein by this chapter, during the balance of the term of such tax certificate, with the same rights, and subject to the same liabilities as if such[2] person were an original applicant for such certificate and the original owner thereof, upon the making and filing of a new application and bond by such purchaser in the form and as provided for by sections fifteen and sixteen of this chapter, and a consent in writing executed and acknowledged by any person to whom such certificate may have been transferred or assigned as collateral security for moneys loaned or any other obligation incurred,[3] and the presentation of the tax certificate to the officer who issued the same or to his successor in office, who shall write or stamp across the face of the certificate over his signature the words "consent is hereby given for the transfer of this liquor tax certificate to (and here insert the name of the corporation, association, copartnership or person to which or to whom the same is transferred)"; provided, however, that no such sale, assignment or transfer shall be made except in accordance with the provisions of this chapter, nor permitted by any holder of a certificate who shall have been convicted, or be under indictment, or against which or whom a complaint under oath shall have been made, and be pending, for violating the provisions of this chapter or who shall have violated

[1] Words "changing the place of traffic," added to title.
[2] Words "corporation, association, copartnerships or" omitted.
[3] Words "and a consent in writing . . . obligation incurred," new.

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any provision of this chapter. [1] If, however, the person to whom such liquor tax certificate was sold, assigned and transferred, shall not desire to traffic in liquors in the premises for which said liquor tax certificate was issued, but shall desire to transfer to and carry on such business for which the liquor tax certificate was issued in other premises than those designated in the original application and in the tax certificate, but in the same city, borough or town and in premises where such traffic is not prohibited by this chapter during the balance of the term of such tax certificate with the same rights and subject to the same liabilities as if such person were an original applicant for such certificate and the original owner thereof, upon the making and filing of a new application and bond in the form provided for in sections fifteen and sixteen of this chapter to traffic in liquors at said other premises, and a consent in writing executed and acknowledged by any person to whom such certificate may have been transferred or assigned as collateral security for moneys loaned, or any other obligation incurred, and the presentation of the liquor tax certificate, the officer who issued the same, or his successor in office shall write or stamp across the face of the certificate over his signature the words "consent is hereby given for the transfer of this liquor tax certificate to (and here insert the name of the person to whom the same is transferred) and the traffic in liquor permitted to be carried on under this certificate is hereby transferred from (here insert the description of the original locality) to (here insert the description of the new locality)." For each indorsement under sections twenty-four, twenty-five and twenty-six of this chapter, the officer making the same shall charge and receive the sum of ten dollars to be paid by the applicant, which sum shall be apportioned and accounted for as are taxes, as provided in sections ten and eleven of this chapter.

This section was derived from the Liquor Tax Law of 1896, § 27, as amended by L. 1897, ch. 312, § 18. It was amended to read as above by L. 1911, ch. 407, § 3. The amendments are given in the footnotes.

Section 26 of the Liquor Tax Law of 1896 is now covered by section 25.

State commissioner to be made party to all actions and proceedings relative to transfer of certificates: see supra, § 3.

Right to assign or transfer liquor license: see Ann. Cas. 1913A 461 note.

Transfer as security.—A transfer of a certificate as collateral security is not covered by this section. Bachmann-Bechtel Brewing Co. v. Gehl, (1913) 154 App. Div. 849, 139 N. Y. 807. See supra, § 12a.

[1] Following sentence new.

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Transfer of license under Excise Law of 1892.— Under the Excise Law of 1892, a person who had not been licensed prior to the passage of the act was forbidden to sell liquors in any building not used for hotel purposes within 200 feet of a building used exclusively as a church or schoolhouse, and it was held that the privilege thus given of selling within such prescribed distance was personal to the licensee and did not pass to his successor in the premises. People v. Murray, (1896) 148 N. Y. 171, 42 N. E. 584. No other person being qualified to traffic in liquors within the prescribed distance of a church or schoolhouse, such a license was not transferrable. Matter of Place, (1898) 27 App. Div. 561, 50 N. Y. S. 640, affirmed without opinion (1898) 156 N. Y. 691, 50 N. E. 1121. "There probably is no question that ordinarily and under the Excise Law as it formerly stood the payment of a license fee for transacting the liquor business would secure to the one paying it a personal right and privilege to transact such business which would not be subject to transfer and assignment, such as is claimed by the brewing company here. The Liquor Tax Law, however, was evidently intended to change this and to give a certificate issued under it and the rights of surrender and repayment under such certificate, the status of property invested with the qualities of being assigned, transferred and disposed of." Matter of Jenney, (1897) 19 Misc. 244, 44 N. Y. S. 84, affirmed 19 App. Div. 627, 46 N. Y. S. 1094.

Certificates as transferable property.—"Liquor tax certificates, or the right to engage in the sale of liquors, constitute, under the present law, a species of property transferrable by the party procuring the same." Matter of Lyman, (1899) 160 N. Y. 96, 54 N. E. 577.

Certificate issued to one convicted of felony.—Where a certificate has been issued to one convicted of a felony, it is void ab initio under section 21, and an assignment thereof gives no right to the assignee to recover the rebate upon a surrender of the certificate. People v. Lyman, (1900) 33 Misc. 243, 68 N. Y. S. 331.

Certificate not issued.—An agreement relative to a certificate not yet issued, may not be sufficient to constitute a sale under this section of a subsequent certificate. People v. Carey, (1915) 167 App. Div. 949, 152 N. Y. S. 569.

Steps to make sale effective.—This section provides for the transfer of a certificate during the time for which it was granted, but to make such transfer effective the statute requires that the purchaser make and file an application and bond, and procure the consent of the certificate issuing officer to the transfer thereof. Matter of Clement, (1907) 55 Misc. 615, 105 N. Y. S. 1085.

Necessity of consent to transfer.—The intent to transfer a certificate can be effectuated only by presenting the same to the proper officer and having his consent indorsed thereon as provided in this section. People v. Carey, (1915) 167 App. Div. 949, 152 N. Y. S. 569.

Refusal of consent to transfer.—Although under this section the assignee of a certificate cannot continue to traffic in liquors without the consent of the certificate issuing officer, under the provisions of this section and section 27, such consent cannot be arbitrarily refused. Niles v. Mathusa, (1897) 20 App. Div. 483, 47 N. Y. S. 38, affirmed (1900) 162 N. Y. 546, 57 N. E. 184.

Verbal complaint against assignor.—The fact that a verbal complaint of a violation of the Liquor Tax Law has been made to a county treasurer does not justify him in refusing to transfer the certificate. People v. Manzer, (1896) 18 Misc. 292, 41 N. Y. S. 1075.

Continuance of liability on bond.—Where a certificate has been assigned, the principal and surety are liable on the bond for violations of the law by the assignee during the life of the certificate, where the certificate has not been surrendered for cancellation and the assignment has not received the consent of the proper officer in the manner required by this section. Cullinan v. Kuch, (1904) 177 N. Y. 303, 69 N. E. 597.

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Assignee as affected by acts of assignor after assignment.—A liquor tax certificate held by an innocent transferee thereof may be revoked for acts of transferor committed prior to the transfer. Matter of Farley, (1916) 217 N. Y. 105, 111 N. E. 479; Matter of Farley, (1912) 151 App. Div. 456, 135 N. Y. S. 869; Matter of Cullinan, (1905) 104 App. Div. 205, 93 N. Y. S. 492, affirmed (1906) 185 N. Y. 546 mem.; Matter of Cullinan, (1903) 87 App. Div. 47, 83 N. Y. S. 1025; Matter of Farley, (1914) 88 Misc. 259, 151 N. Y. S. 838. "The limitation or forfeiture of the rights of a certificate holder, in a liquor tax certificate, equally affects the rights of his assignee who takes it subject to the conditions and restrictions with which the holding of the same by the assignor was vested." People v. Lyman, (1900) 33 Misc. 243, 68 N. Y. S. 331. And a violation of the Liquor Tax Law by the assignor thereof after he has made the assignment, will render the certificate revocable as against the assignee. Matter of Bradley, (1898) 22 Misc. 301, 49 N. Y. S. 1100. An assignee will lose his right to the rebate upon a surrender of the certificate, if the original holder sells liquors on the premises after the assignee has taken the certificate for surrender. Matter of Mitchell, (1899) 41 App. Div. 271, 58 N. Y. S. 632. And see, supra, section 24, as to the payment of rebates. An assignee will not receive the rebate where there is pending an indictment against the assignor, though the violation charged therein was committed while the assignor was the holder of another certificate. People v. Lyman, (1901) 59 App. Div. 172, 69 N. Y. S. 111. But a judgment of conviction of the assignor of a certificate is not competent evidence against the assignee to prove the violation by the assignor. Matter of Farley, (1916) 217 N. Y. 105, 111 N. E. 479. Where a liquor tax certificate is assigned by the original owner as collateral security and the assignee is empowered to surrender the certificate and receive the rebate, the rights of the assignee to receive the rebate after a surrender are suspended by the arrest of the original holder within thirty days after the date of the rebate receipt; and where the original certificate was held by a partnership, a violation of law by one member is deemed a violation by the firm. People v. Lyman, (1898) 156 N. Y. 407, 50 N. E. 1112, affirming 27 App. Div. 527, 50 N. Y. S. 497.

Estoppel of assignee to claim certificate as against creditors.—An assignee of a certificate, who allows it to remain in the hands of the assignor, is not thereby estopped from setting up title thereto as against a subsequent judgment creditor of the assignor; and, although such a creditor is entitled to reach, through a receiver in supplementary proceedings, the assignor's interest in such certificate, subject to the provisions of the Liquor Tax Law, he stands in no better position than if he were a subsequent assignee of the certificate as security for his debt. Niles v. Mathusa, (1900) 162 N. Y. 546, 57 N. E. 184, affirming 20 App. Div. 483, 47 N. Y. S. 38.

Priority of assignee and receiver in supplementary proceedings.—Where a certificate is surrendered to a county treasurer by the receiver in supplementary proceedings of the person to whom it was issued, and the county treasurer receives the same and transmits it to the commissioner of excise, without knowledge that an assignment thereof had been made before the appointment of the receiver, the county treasurer is not liable to the assignee as for a conversion. Albany Brewing Co. v. Barckley, (1899) 42 App. Div. 335, 59 N. Y. S. 65. One who takes an assignment of a certificate and advances money for its purchase has a right thereto prior to that of a receiver subsequently appointed in supplementary proceedings against the assignor. Niles v. Mathusa, (1897) 19 Misc. 96, 44 N. Y. S. 88. Where a creditor has attached a certificate, though the holder thereafter assigns the certificate before the creditor procures a judgment, a receiver in supplementary proceedings on such judgment has a right to the rebate prior to that of the assignee. Knapp v. Scanlin, (1902) 36 Misc. 756, 74 N. Y. S. 458.

Attack by receiver of assignor on validity of assignment.— If a receiver of a former holder of a liquor tax certificate desires to question the legality

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of an assignment thereof, he should do so by an action to set aside the assignment; he cannot treat the assignment as a nullity and attack it collaterally. Herman v. Goodson, (1896) 18 Misc. 604, 42 N. Y. S. 696.

Rent of license.—The right to sell liquors is not a privilege which can be rented without the consent of the state, and an agreement to pay for the use thereof is void as against public policy. Mayer Brewing Co. v. Mack, (1908) 59 Misc. 202, 110 N. Y. S. 245.

Cited.— People v. Masterman, (1913) 209 N. Y. 182, 102 N. E. 553; In re Marshall, (1916) 97 Misc. 492, 160 N. Y. S. 698.

§ 27. Certiorari upon refusal to issue or transfer liquor tax certificates, and of the revocation and cancellation of a liquor tax certificate. 1. Whenever any officer charged with the duty of issuing or consenting to a transfer of a liquor tax certificate under the provisions of this chapter shall refuse to issue or transfer the same, such officer shall indorse the application therefor, or attach thereto a statement of his reasons for such determination, and shall, if requested, furnish to the applicant a copy of such statement. Such applicant shall have the right to a writ of certiorari to review the action of such officer. The writ may be issued by, returnable to, and heard by a county judge of the county, or a justice of the supreme court of the judicial district in which the premises are situated in which the applicant desires to carry on the business of trafficking in liquors. If the writ be granted, the officer to whom it is directed shall in his return thereto, include copies of all the papers on which his action was based, and a statement of his reasons for refusing to grant such application. If such judge or justice shall upon the hearing determine that such application for a liquor tax certificate or for a transfer has been denied by such officer without good and valid reasons therefor, and that under the provisions of this chapter such liquor tax certificate should be issued or transferred, such judge or justice may make an order commanding such officer to grant such application and to issue or transfer such liquor tax certificate to such applicant upon the payment of the tax or fee therefor.

2. At any time after a liquor tax certificate has been issued to any person under section eight of this chapter, said liquor tax certificate may be revoked and canceled if material statements in the application of the holder of such certificate were false, or if the consents required by section fifteen are not properly filed as required by said section, or if the holder of said certificate was not for any reason entitled to receive or hold the same, or to traffic

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in liquors, or if any provision of this chapter is violated at the place designated in said certificate as the place where such traffic is to be carried on by the holder of said certificate, or by his agent, servant, bartender or any person whomsoever in charge of said premises, or if the holder of said certificate shall violate any of the provisions of this chapter at any place. For the purpose of obtaining such an order, the state commissioner of excise, the deputy state commissioner of excise, or any taxpayer of the city, borough, village or town for which such liquor tax certificate was issued, who occupies or owns a dwelling situated within three hundred feet of the certificated premises[1] may present a verified petition to a justice of the supreme court, or a special term of the supreme court of the judicial district, or the county court or judge of the county in which such traffic in liquors is designated to be carried on, or in which the holder of such certificate resides, or, if such holder of a liquor tax certificate is authorized to traffic in liquor under subdivision four or five of section eight of this chapter, to a justice of the supreme court of the judicial district in which the principal office within this state of the corporation, association, copartnership or person is located, for an order revoking and canceling such certificate upon either or all of the grounds hereinbefore stated. Such petition shall state the facts upon which such application is based, and the state commissioner of excise shall be made a party to the proceeding, and from all other parties thereto shall be entitled to due notice of all proceedings, and shall be duly served with copies of all papers and pleadings where such notice of proceedings is not given to, and such service of papers and pleadings is not made upon, an attorney appearing therein upon his behalf pursuant to a designation under section seven of this chapter. Upon the presentation of the petition, the justice, judge or court shall grant an order requiring the holder of such certificate to show cause before such justice, judge or court, or before a special term of the supreme court of the judicial district, on a day specified therein, not more than ten days after the granting thereof, why an order revoking and canceling such liquor tax certificate should not be granted; and said order shall also contain an injunction restraining the said certificate holder from transferring or surrendering such certificate for rebate,

[1] Words "who occupies or owns a dwelling situated within three hundred feet of the certificated premises," added by L. 1910, ch. 503.

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except as is hereinafter provided, until the final determination of the proceeding. Before granting such order to show cause or at any time during the pendency of said proceeding, upon motion of any party thereto on not less than five days' notice, said justice, judge or court may as a matter of discretion, if the petitioner be a taxpayer other than the state commissioner or deputy state commissioner of excise, order him to present a bond to the people of the state of New York, with sufficient sureties, in a penal sum of not more than five hundred dollars nor less than one hundred dollars, as said justice, judge or court shall direct, to be approved by the said justice, judge or court and filed in the office of the state commissioner of excise, together with a copy of the order requiring such bond, within five days thereafter, conditioned that the said proceeding will be prosecuted to a final determination without delay, and will not be suspended, compromised, settled or discontinued except in pursuance of an order of the court as provided herein, and the state commissioner of excise may commence and maintain an action for the full penalty thereof on account of the breach of any condition of said bond as though such bond were given under section sixteen of this chapter. A copy of such petition and order shall be served upon the holder of such certificate, and the officer issuing the same, or his successor in office, and upon the state commissioner of excise, in the manner directed by such order, not less than five days before the return day thereof. On the day specified in such order, the justice, judge or court before whom the same is returnable shall grant such order revoking and canceling the said liquor tax certificate, unless the holder of said liquor tax certificate shall present and file an answer to said petition, which answer denies each and every violation of this chapter alleged in the petition, and raises an issue as to any of the facts material to the granting of such order, in which event the said justice, judge or court shall hear the proofs of the parties in relation to the allegations of the petition or answer. If the said evidence establishes any of the facts hereinbefore set forth as sufficient to revoke and cancel a certificate, an order shall be granted by said justice, judge or court revoking and canceling such certificate. Said order shall also provide that the holder of said liquor tax certificate, or any other person having such certificate in his possession or under his control, shall forthwith surrender said certificate to the officer who issued the same, or to his

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successor in office. A criminal prosecution and conviction for any violation of this chapter shall not be a condition precedent to the granting of an order revoking and canceling any liquor tax certificate for any violation of this chapter. Upon the entry of such order in the county clerks' office of the county in which the traffic in liquors is authorized to be carried on under the certificate so revoked, and filing a copy thereof with the officer who issued such certificate, or his successor in office, and the service of a certified copy thereof upon the holder of said liquor tax certificate, or such substituted service as the court, judge or justice may direct, all the rights of the holder of said liquor tax certificate under such certificate, to traffic in liquors or to any rebate thereon under this chapter, shall cease; and the holder of said liquor tax certificate, or any other person having such certificate in his possession or under his control, upon whom service of a certified copy of said order shall be made in like manner, shall immediately surrender said certificate to the officer who issued the same, or to his successor in office. The neglect or refusal on the part of any person to surrender said certificate in pursuance of such order immediately upon the service thereof, shall be a contempt of court, punishable in the manner provided by the judiciary law. Upon the granting, entry and service of an order revoking and canceling a liquor tax certificate issued under subdivision three of section eight to any person who is a licensed druggist or licensed pharmacist, such person shall, in addition to the other penalties prescribed by this chapter, forfeit the use of his license as such druggist or pharmacist for the term of one year and be deprived of all rights and privileges thereunder during such period, and such license shall be surrendered with the liquor tax certificate so revoked and canceled, to be held by the officer to whom the same is surrendered, or his successor in office until the expiration of such period of suspension; and upon the granting, entry and service of an order revoking and canceling a liquor tax certificate issued to any person who is not a licensed druggist or a licensed pharmacist, but is in copartnership with or has such licensed druggist or licensed pharmacist in his employ at the place for which such liquor tax certificate was issued, and it shall appear from said order that any violation of this chapter has been committed by such licensed druggist or licensed pharmacist, or with his knowledge or consent at the place for which such liquor tax

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certificate was issued, the license of such druggist or pharmacist shall be similarly forfeited and surrendered. For the term of one year thereafter, no liquor tax certificate shall be issued to any[1] person to traffic in liquors under subdivision three of section eight of this chapter, at the place for which such revoked and canceled liquor tax certificate was issued. The neglect or refusal on the part of any person to surrender his said license immediately upon the service of such order shall be a contempt of court, punishable in the manner provided by the judiciary law. Costs upon such proceeding may be awarded in favor of and against the petitioner or the certificate holder or other party to such proceeding,[2] in such sums as in the discretion of the justice, judge or court before which the petition is heard, may seem proper. At the time of the return of the show cause order, or at any time thereafter during the pendency of the proceeding upon five days' notice to the certificate holder by any party, the justice, judge or court granting the same may grant an injunction order restraining the certificate holder, his agents and servants from trafficking under the certificate or certificates sought to be canceled in the proceeding, or at the place or places for which the same were issued, and requiring that the said certificate or certificates be immediately delivered to the officer who issued the same, to be held until the final determination of the proceeding, provided that, if the material allegations of the petition be upon information and belief, the justice, judge or court must require the presentation of one or more affidavits containing positive averments made by witnesses having personal knowledge of facts constituting one or more of the violations of law set forth in the petition. Before granting such injunction order said justice, judge or court may, if the petitioner be a taxpayer other than the state commissioner or deputy state commissioner of excise, require him to file a bond, with sufficient sureties, to the certificate holder, to be approved by the justice, judge or court, conditioned that in case the certificate holder is successful in the proceeding, the petitioner will pay all costs taxed and allowed, and all damages not exceeding the sum of two hundred and fifty dollars. Such injunction order shall be served upon the certificate holder as provided therein, and failure to

1 Words "corporation, association, copartnership or" omitted by L. 1909, ch. 281.

2 Words "or other party to such proceedings," added by L. 1910, ch. 503.

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comply with its requirements shall be a contempt of court. No proceeding instituted for the cancellation of a liquor tax certificate shall be suspended, compromised, settled or discontinued except by order of the justice, judge or court before whom or[1] which the same is pending, upon not less than eight days' written notice to all parties, including the state commissioner of excise, of the time and place, when and where application for such order will be made. The granting of such order of discontinuance must be for sufficient cause in the discretion of the justice, judge or court, which must be recited therein, and shall be upon such terms and conditions as shall be prescribed in the order. If any person shall attempt or offer to make any settlement or compromise of any such proceeding, except as above provided, or shall demand, or receive, or offer to receive, directly or indirectly, any money or other thing of value as a consideration for not commencing or prosecuting any proceeding for the cancellation of a liquor tax certificate, he shall be guilty of a misdemeanor, and, upon conviction, shall be subject to the same penalties prescribed in subdivision one of section thirty-six[2] of this chapter. In case a liquor tax certificate is surrendered pursuant to an injunction order or otherwise during the pendency of a cancellation proceeding, and the petitioner shall be unsuccessful therein, the final order shall provide that a pro rata rebate be computed by the state commissioner of excise for the actual time that traffic has been suspended under the injunction order, and the said state commissioner shall prepare two orders for the payment of such rebate, one order for the one-half thereof directed to the state treasurer, to be paid by him on the certificate of the comptroller, and one order for the one-half of such rebate directed to the fiscal officer of the proper locality, to be paid by such fiscal officer out of any excise or other moneys of such locality applicable thereto, as provided in section twenty-four of this chapter in case of voluntary surrender of a certificate.

This section was derived from the Liquor Tax Law of 1896, § 28, as amended by L. 1897, ch. 312, § 19; L. 1900, ch. 367, § 9; L. 1901, ch. 640, § 5; L. 1903, ch. 486, § 12; L. 1905, ch. 680, § 3; L. 1906, ch. 272, § 1, and L. 1908, ch. 350, § 8. It was amended to read as above by L. 1909, ch. 281, § 8, and L. 1910, ch. 503, § 5. The amendments affected subdivision 2 and are given in the footnotes.

Section 27 of the Liquor Tax Law of 1896 is now covered by section 26.

[1] Words "whom or" inserted by L. 1909, ch. 281.

[2] Words "thirty-five" changed to "thirty-six" by L. 1909, ch. 281.

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Application for certificate: see supra, § 15. *Bond accompany application:* see supra, § 16. *Issuance of certificate:* see supra, § 17. *Form of certificate:* see supra, § 18. *Posting certificate:* see supra, § 19. *Surrender of certificate and payment of rebate:* see supra, § 24. *Assignment of certificate:* see supra, § 26. *Prohibition of gambling:* see supra, § 21, subd. 7. *Revocation of certificate as bar to issuance of another certificate:* see supra, § 23, subd. 4. *Violations authorizing revocation:* see infra, § 30. *Forfeiture of certificate:* see infra, § 36.

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I. Generally

Quo warranto to test validity of liquor license: see 24 L. R. A. (N. S.) 555 note.

Wrongful refusal of license as defense to prosecution for sale of liquor without license: see 17 Ann. Cas. 60 note.

Mandamus.—The refusal of the county treasurer to issue a certificate to one entitled thereto, can be reviewed only by certiorari under this section; a writ of mandamus cannot be issued to compel him to grant the certificate, for where a new duty is imposed by statute, if a remedy is given by the same statute for its nonperformance, the remedy given is exclusive. People v. McKee, (1910) 69 Misc. 34, 125 N. Y. S. 660. See also, Matter of Cole, (1897) 1 Liq. Tax Law Rep. 199.

Cited.— Stern v. Metropolitan Life Ins. Co., (1915) 90 Misc. 129, 154 N. Y. S. 283, reversed 169 App. Div. 218; Matter of Farley, (1914) 84 Misc. 594, 147 N. Y. S. 859, affirmed 163 App. Div. 953, 148 N. Y. S. 1115, affirmed (1914) 212 N Y. 591 mem.; People v. Manganaro, (1912) 76 Misc. 293, 137 N. Y. S. 82; Marquardt v. Clement, (1910) 68 Misc. 96, 124 N. Y. S. 934.

In the case of In re Marshall, (1916) 97 Misc. 492, 160 N. Y. S. 698, this section was cited as the basis of procedings to compel transfer of a license refused on the ground that it would violate subdivision 9 of section 8. See supra, § 8, note, IV, *Ratio of Certificates.*

II. Certiorari to Compel Issuance of Certificate

Certiorari generally: see Code Civ. Pro., § 2120 et seq.

County court.—A writ of certiorari under subdivision 1, though it may be issued by a county judge, cannot be issued by the County Court, as such. People v. Hegeman, (1915) 168 App. Div. 419, 153 N. Y. S. 112; People v. Slocum, (1914) 161 App. Div. 733, 146 N. Y. S. 556. Objection may be taken at any time to the jurisdiction of the County Court. People v. Slocum, (1914) 161 App. Div. 733, 146 N. Y. S. 556.

Return of county treasurer.—A certiorari to review the action of the county treasurer in refusing to issue a certificate to the relator brings up only those papers upon which his decision was based. Hence, when as a result of a local option vote a certificate is filed with him by which he is officially advised

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that the result of the vote is adverse to the granting of licenses and he refuses to grant a license on that ground, he cannot be compelled to attach to his return to the writ a certified copy of the votes cast at the election. Matter of Tinkcom, (1906) 50 Misc. 250, 100 N. Y. S. 467.

Attack on validity of local option election.—Where the county treasurer has refused to issue a certificate because of the result of a local option election, on a certiorari to review his action the relator cannot attack the validity of the election. People v. Hamilton, (1899) 29 Misc. 465, 61 N. Y. S. 979; People v. Hasbrouck, (1897) 21 Misc. 188, 47 N. Y. S. 109.

Costs against county treasurer a county charge.— Costs which are awarded in a proceeding under subdivision 1 of this section against a county treasurer, are, under subdivision 18 of section 240 of the County Law, a proper county charge. Op. Atty.-Gen. (1913) 532.

Appeal by county treasurer.—Where a writ of certiorari has been issued to review the acts of a county treasurer who refused to issue a certificate and the decision is adverse to the county treasurer, such official may appeal to the Appellate Division from the order. Though the order does not affect him pecuniarily, he has such an interest in the subject as to make him a party aggrieved within the meaning of section 1294 of the Code of Civil Procedure. People v. Sackett, (1897) 15 App. Div. 290, 44 N. Y. S. 593.

Restitution on reversal of order directing county treasurer to issue certificate.—Where a county treasurer refuses to issue a certificate, but his decision is reversed by a writ of certiorari, and the relator thereupon pays the tax and secures a certificate under the order, but on an appeal to the Appellate Division by the county treasurer the order requiring the issuance of the certificate is reversed, the Appellate Division, under section 1323 of the Code of Civil Procedure, will order restitution to the holder of a pro rata amount of the tax so paid. People v. Sackett, (1897) 15 App. Div. 290, 44 N. Y. S. 593.

III. Revocation of Certificate

1. Grounds Generally

Right to and effect of judicial review of revocation of liquor license: see Ann. Cas. 1917A 1024 note.

Right of licensee to damages for wrongful revocation of liquor license: see 14 Ann. Cas. 674 note.

Certificate subject to cancellation.—The holder of a liquor tax certificate receives it under the provisions of the law and subject to all the causes provided for its cancellation under the methods of procedure pointed out by the act. Matter of Lyman, (1898) 1 Liq. Tax Law Rep. 254.

Certificate issued to abandoned premises under Ratio Act.—Where a certificate has been issued for traffic at premises for which a notice of abandonment has been filed under subdivision 9 of section 8, during the period of sixty days in which the former holder may apply for a transfer, the certificate should be revoked under subdivision 2 of this section. People v. Shults, (1915) 167 App. Div. 33, 152 N. Y. S. 301; Matter of Green, (1916) 171 App. Div. 583, 157 N. Y. S. 736.

The mere issuance of a certificate for traffic at certain premises does not raise an estoppel as against the right of the commissioner to revoke such certificate, where such certificate is thereafter rendered void because of the filing of a certificate of abandonment of traffic at the premises under the provisions of subdivision 9 of section 8. Matter of Green, (1916) 171 App. Div. 583, 157 N. Y. S. 736. The court said: "The mere issuance of a certificate which subsequently is rendered void under the statute works no estoppel, nor is Matter of Farley v. Miller (216 N. Y. 449), upon which respondent relies, authority for such a proposition. In that case the right to revoke

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a certificate on the ground that answers to questions in the application were false was denied, it appearing that notice of abandonment had been filed but had become null and void because not acted upon as expressly required by the statute. It also there appeared that the certificate was issued after the notice of abandonment had become so null and void, and after a full disclosure of all the facts and circumstances surrounding the application had been made to the officer issuing the certificate, who directed the applicant to answer in the negative the question," Has a notice of abandonment . . . been heretofore filed?" The court held that under such circumstances the state, through its agent, was estopped from destroying the property of the applicant on the ground that the answer was false."

Insufficient bedrooms in hotel.—A certificate for traffic in connection with a hotel will be revoked, if there are not a sufficient number of bedrooms in the hotel of the size required by subdivision N-2 of section 30. Matter of Ryon, (1903) 39 Misc. 698, 80 N. Y. S. 1114, affirmed 85 App. Div. 621, 83 N. Y. S. 123. Compare Matter of Sunders, (1900) 2 Liq. Tax Law Rep. 262.

Vote of electors against issuance of certificates.—A certificate will be revoked where the town has voted against the issuance of certificates. People v. Douglass, (1911) 143 App. Div. 750, 128 N. Y. S. 547; Matter of Lyman, (1899) 28 Misc. 278, 59 N. Y. S. 828.

Social club.—A certificate issued to a social club cannot be revoked upon the ground that, although it was organized in good faith, it is not now carrying out the purposes of its incorporation; but the remedy, if any, would probably be a proceeding by the attorney-general to forfeit the charter. Matter of Lyman, (1897) 1 Liq. Tax Law Rep. 252.

"Any other reason."—"What is 'any other reason?' In the absence of statutory specification, is the certificate holder remitted to conjecture, and must he conjecture aright under penalty of forfeiture of all rebate after he has voluntarily surrendered his certificate for cancellation? Forfeitures are odious in law. Where the forfeiture, after the voluntary surrender of the certificate rests upon 'any other reason' than the grounds specifically stated in the statute, we think it should appear by the statute itself, or in some other statute, what is meant by the phrase 'any other reason.' It should not be left to the accuser to devise it, or for the court to spell it out in penal cases from reasons of public policy." Matter of Lyman, (1900) 163 N. Y. 536, 57 N. E. 745.

2. *False Statement in Application*

Answers construed together.— In determining whether an applicant has made a false statement, the application must be construed as a whole. Matter of Johnston, (1897) 1 Liq. Tax Law Rep. 167.

No answer as a false answer.—Where an applicant fails to make any answer to a question in his application, such failure is not deemed equivalent to a false statement, and the certificate will not be cancelled because of the applicant's failure to answer a question. Matter of Lyman, (1900) 163 N. Y. 536, 57 N. E. 745, reversing 51 App. Div. 52, 64 N. Y. S. 756.

Considered as of date of application.— The truthfulness of a statement in an application is to be judged as of the time the application is made and the certificate issued. Matter of Barnard, (1900) 48 App. Div. 423, 63 N. Y. S. 255; Matter of McMonagle, (1903) 41 Misc. 407, 84 N. Y. S. 1068; Matter of Lyman, (1900) 2 Liq. Tax Law Rep. 260; Matter of Adriance (1900) 2 Liq. Tax Law Rep. 408; Matter of Cullinan, (1902) 2 Liq. Tax Law Rep. 611. Thus, a certificate issued for traffic in a hotel will be cancelled where the applicant did not possess a hotel meeting the statutory requirements, though he subsequently becomes possessed of such a hotel. Matter of Barnard, (1900) 48 App. Div. 423, 63 N. Y. S. 255; Matter of McMonagle, (1903) 41 Misc. 407, 84 N. Y. S. 1068. And where an applicant has the

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requirements of a hotel at the time of making the application, it has been held that alterations in the structure bringing it below the requirements is not ground for the revocation of the certificate, though if he availed himself of the privileges of a hotel certificate after making the alteration, the certificate might be revoked for a violation of the law. Matter of Lyman, (1900) 2 Liq. Tax Law Rep. 260. See infra, section 30, subdivision N-2, as to the structural requirements of hotels.

Good faith of applicant.—"An untruthful answer of the applicant is not false, within the intent of the statute, for the purpose of revoking the certificate, when the information which the question was intended to elicit was, at the time of the making and for the purpose of the application, truthfully, explicitly and in good faith imparted to the certificate issuing officer, and the answer within the application was that directed by him. The state, through its agent or representative, having interpreted and acted upon the information so received, is equitably estopped from destroying the property of the applicant upon the ground that the answer was false." Matter of Farley, (1916) 216 N. Y. 449, 111 N. E. 66. Compare, Matter of Harper, (1900) 30 Misc. 663, 64 N. Y. S. 524, holding that a certificate will be revoked for a material false statement in the application, though the statement is made in good faith.

Materiality of statement.—The false statement in an application which justifies its revocation is a material false statement of fact; if the statement is immaterial it does not afford any ground for the revocation of the certificate. Matter of Hawkins, (1900) 165 N. Y. 188, 58 N. E. 884; Matter of Moulton, (1901) 59 App. Div. 25, 69 N. Y. S. 14, affirmed on opinion below, (1901) 168 N. Y. 645, 61 N. E. 1131; Matter of Clement, (1907) 52 Misc. 325, 102 N. Y. S. 178. The test of whether a statement is material, is whether the applicant would have been entitled to a certificate had he truthfully answered the questions in the application. If he could have received a certificate by making correct answers, the certificate will not be revoked. Matter of Moulton, (1901) 59 App. Div. 25, 69 N. Y. S. 14, affirmed on opinion below, (1901) 168 N. Y. 645, 61 N. E. 1131; Matter of Jenny, (1897) 1 Liq. Tax Law Rep. 196. But a falsehood is material, where if the truth had been told the applicant could not have received a certificate without the consent of nearby owners. Matter of Lyman (1900) 2 Liq. Tax Law Rep. 319.

An erroneous statement as to the number of dwellings within the prescribed distance of 300 feet from the liquor premises or as to the presence of churches or schoolhouses, does not require the cancellation of the certificate. if the premises were occupied as a hotel prior to March 23, 1896. Matter of Moulton, (1901) 59 App. Div. 25, 69 N. Y. S. 14, affirmed on opinion below, (1901) 168 N. Y. 645, 61 N. E. 1131. And, conversely, a certificate will not be revoked for an untrue statement as to premises being occupied for traffic on March 23, 1896, when there are no churches, schoolhouses or dwellings within the prescribed distances from the owners of which consents might be required. Matter of Keene, (1896) 1 Liq. Tax Law Rep. 79; Matter of Jenny, (1897) 1 Liq. Tax Law Rep. 196. A statement in an application that the premises have been used "continuously" for hotel purposes since a certain date is immaterial and does not warrant the revocation of the certificate, where it appears that traffic at the premises had not been abandoned, though the statement was incorrect for the reason that traffic had been suspended for two or three years on account of a destruction of the building by fire. Matter of Clement, (1907) 52 Misc. 325, 102 N. Y. S. 178. Under section 15, subdivision 5, as it read in 1900, on an application for a certificate within 200 feet of a church or schoolhouse, or on an application for traffic by one who did not file the consents of the owners of dwellings within the prescribed distance, but who relied upon the provision of the statute allowing the issuance of the certificate when the premises were occupied for the liquor

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traffic on March 23, 1896, it was not necessary that the application state whether the premises had been continuously occupied for the liquor traffic since that date; hence such a statement in the application was immaterial and could not form the basis of a proceeding for the cancellation of the certificate. Matter of Hawkins, (1900) 165 N. Y. 188, 58 N. E. 884.

Statement of matter of law.—"The false statements in an application which will justify its revocation under the statute must relate to some material matter of fact, and it must be shown that such fact was wilfully misstated by the applicant. If the statement relates to some matter of law, as to which the applicant is ignorant or misinformed, that will not be sufficient to warrant the court in canceling a certificate." Matter of Kessler, (1900) 163 N. Y. 205, 57 N. E. 402.

Traffic in hotel.—Statements in an application that the applicant intends to carry on a bona fide hotel and that such hotel complies with the requisites provided by the statute for hotels, are material; and, if false, the certificate will be revoked. Matter of Cullinan, (1903) 39 Misc. 646, 80 N. Y. S. 626.

Proximity to school.—A statement in an application that the premises where liquors are to be sold are not within 200 feet of a school, is a material statement; and, if false, the certificate will be canceled. Matter of Lyman, (1900) 48 App. Div. 275, 62 N. Y. S. 846; Matter of Lyman, (1900) 2 Liq. Tax Law Rep. 412.

Owner of premises.—If the only title which the applicant has to the premises is a contract to purchase, and he fails to annex to the application the consent of the owner of the legal title, as required by subdivision 6 of section 15, the certificate will be revoked. Matter of Selig, (1903) 3 Liq. Tax Law Rep. 106.

Consents of owners.—If a certificate holder has made a material false statement in his application relative to the consents of the owners of dwellings within 300 feet of the liquor premises, the certificate will be revoked. Matter of Flanagan, (1900) 49 App. Div. 99, 63 N. Y. S. 531; Matter of Rasquin, (1902) 37 Misc. 693, 76 N. Y. S. 404; Matter of Lyman, (1901) 34 Misc. 296, 69 N. Y. S. 781; Matter of Johnston, (1897) 1 Liq. Tax Law Rep. 167.

Number of dwellings within 300 feet.—A certificate may be revoked, if the holder made a material false statement in his application as to the number of dwellings within 300 feet of the premises. Matter of Livingston, (1897) 24 App. Div. 51, 48 N. Y. S. 989; Matter of Auerbach, (1900) 31 Misc. 44, 64 N. Y. S. 602; Matter of Bridge, (1898) 25 Misc. 213, 55 N. Y. S. 54, affirmed on opinion below, 36 App. Div. 533, 55 N. Y. S. 54. Compare Matter of Lyman, (1898) 23 Misc. 710, 53 N. Y. S. 52. A certificate must be revoked where the holder in his application stated that there were no dwellings within the prescribed distance of the premises, when in fact there are two such dwellings and neither of them has given the requisite consent. Matter of Wood, (1899) 2 Liq. Tax Law Rep. 29.

Where an application fails to mention a building occupied as a dwelling within the prescribed distance of the nearest entrance to the premises wherein it is proposed to traffic in liquors, a certificate issued on the application will be canceled, although the applicant at the time of making the application intends to, and thereafter actually does change his entrance so that it is more than such distance from such dwelling. People v. Pettit, (1908) 128 App. Div. 870, 113 N. Y. S. 243. A liquor tax certificate may be canceled for a false statement in the application where the original application was false as to the number of dwellings within the prescribed distance, and the renewal application, without directly answering the questions as to consents, states in effect that consents are not required. Matter of Tonatio, (1900) 49 App. Div. 84, 63 N. Y. S. 560.

A statement in an application for a liquor tax certificate that there are twelve buildings within the limit of 300 feet instead of ten, is immaterial if the applicant files the consents of seven of the ten owners. Matter of Clement, (1908) 93 Misc. 563, 157 N. Y. S. 434.

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But a false statement relative to the number of dwellings within the prescribed distance of the liquor premises is immaterial and affords no ground for the revocation of the certificate, where the premises were occupied as a hotel prior to 1896. Matter of Moulton, (1901) 59 App. Div. 25, 69 N. Y. S. 14, affirmed on opinion below (1901) 168 N. Y. 645, 61 N. E. 1131.

Statement of location of bar.—Where an applicant for a liquor tax certificate states that the particular place where liquors are to be sold was in the "front room, ground floor, side or end of building," and after receiving his certificate the holder moves an addition to the house containing but one room used as a kitchen to another part of the lot and places his bar in such room, the certificate will be revoked. Matter of Flanagan, (1900) 49 App. Div. 99, 63 N. Y. S. 531.

Applicants as copartners.—Where persons apply for a liquor tax certificate as copartners, the certificate granted on such statement may be revoked if they are not copartners in fact, though the certificate previously passes to an assignee for value without knowledge that they were not copartners. People v. Hilliard, (1903) 81 App. Div. 71, 80 N. Y. S. 792, affirmed without opinion. (1904) 178 N. Y. 582, 70 N. E. 1106.

Person interested.—A certificate will be revoked where the applicant has falsely stated that he was the only person interested in the business; and, in such a case, it is not material whether the false statement was made intentionally for the purpose of deceiving the excise authorities. Matter of Fall, (1899) 26 Misc. 611, 57 N. Y. S. 858, affirmed 39 App. Div. 671, 57 N. Y. S. 1137.

Felon.— One who has been convicted of a felony is barred by section 21 from obtaining a certificate to traffic in liquors; and a certificate procured on a false statement that he is entitled to traffic in liquors, may be revoked. Matter of Johnston, (1897) 1 Liq. Tax Law Rep. 167.

3. Lack of Consents

In general.— If a certificate holder has failed to attach to his application the necessary consents, as required by section 15, subdivision 8, the certificate will be revoked. Matter of Plate, (1903) 3 Liq. Tax Law Rep. 108; Matter of Johnston, (1897) 1 Liq. Tax Law Rep. 167; Matter of Livingston, (1897) 1 Liq. Tax Law Rep. 227.

Premises two inches within prescribed distance.—Where, after the holder of a certificate was convicted of running a disorderly house and his certificate was thereupon revoked, a rough shack was constructed eight feet in the rear of the premises and a new certificate issued to his step-daughter for traffic in such shack, it was held that such certificate would be revoked, though the case turned on certain premises which lacked but two and two-fifths inches of the prescribed distance. Matter of Clement, (1910) 69 Misc. 181, 124 N. Y. S. 1039.

Good faith.—The fact that the certificate holder acted in good faith believing that the consents attached to his application were signed by the proper persons, is no defense to an application to revoke the certificate, though it may be considered on the question of costs. Lyman v. Murphy, (1900) 33 Misc. 349, 68 N. Y. S. 490; Matter of Miller, (1900) 2 Liq. Tax Law Rep. 330.

Annexation of wrong consent.—A certificate will be revoked where the applicant truthfully stated that there was but one dwelling within the prescribed distance, but, instead of attaching the consent of the owner thereof, attached the consent of the owner of another building outside of the prescribed distance. Matter of Smith, (1897) 1 Liq. Tax Law Rep. 136.

Burden of proof.— In a proceeding for the revocation of a certificate on the ground that the necessary consents were not filed, the burden is not upon the petitioner to show that the premises were not used as a hotel on March

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23, 1896, but the burden is upon the certificate holder to show that he came within one of the exceptions provided by section 15, subdivision 8. Matter of Patterson, (1904) 43 Misc. 498, 89 N. Y. S. 437.

Power of holder to show falsity of statements.—Where the application for a certificate shows on its face that the required number of consents have not been filed and the question as to the date since when the traffic in liquor at the premises has been continuous is not answered, in a proceeding for the revocation of the certificate for the failure to annex the consents the holder cannot show that the premises were used for the traffic on March 23, 1896, and that consequently consents were not required. Matter of Deuel, (1907) 55 Misc. 618, 106 N. Y. S. 1030. And where the question as to continuous traffic since 1896 is answered in the negative, the holder cannot show its falsity when a proceeding is commenced to revoke the certificate on the ground that the consents were not annexed to the application. Matter of Clement, (1907) 53 Misc. 358, 104 N. Y. S. 905.

4. Violation of Law

Validity of statute or ordinance by which conviction of violation of liquor law entails revocation of license and prohibition of sale of liquor: see 30 L R. A. (N. S.) 1004 note; 29 L. R. A. (N. S.) 417 note.

Violation by employee without knowledge of certificate holder.— In a proceeding for the revocation of a certificate on the ground that a violation of law has been committed, it affords the holder no defense that the violation in question was committed by his agent or employee without his knowledge or connivance. Matter of Clement, (1910) 140 App. Div. 223, 124 N. Y. S. 1084; Matter of Cullinan, (1903) 88 App. Div. 6, 84 N. Y. S. 492; Matter of Clement, (1910) 67 Misc. 525, 124 N. Y. S. 814; Matter of Lyman, (1899) 29 Misc. 524, 61 N. Y. S. 946; Matter of Cullinan, (1903) 39 Misc. 636, 80 N. Y. S. 607, affirmed 85 App. Div. 621, 82 N. Y. S. 1098; Matter of Peck, (1901) 2 Liq. Tax Law Rep. 451. Compare Matter of Lyman, (1898) 1 Liq. Tax Law Rep. 409. "He takes his license upon the condition that he will see to it that none of his servants disobey the law. If he neglects this duty, and permits violations of the law, he forfeits his right to the certificate." Matter of Clement, (1910) 140 App. Div. 223, 124 N. Y. S. 1084.

Even when an illegal sale of liquor by the employee is made expressly contrary to the instructions of the certificate holder, it nevertheless affords ground for a revocation of the certificate. Matter of Cullinan, (1903) 39 Misc. 636, 80 N. Y. S. 607, affirmed 85 App. Div. 621, 82 N. Y. S. 1098; Matter of Lyman, (1899) 29 Misc. 524, 61 N. Y. S. 946.

Burden of proof.— In a proceeding to revoke a certificate for a violation of law, the burden is upon the petitioner to establish the violation Matter of Cullinan, (1904) 3 Liq. Tax Law Rep. 309.

Violations at other places.—Where a person maintained an amusement park with five independent drinking places, a certificate having been issued for each, and thereafter he surrendered four of the certificates, it was held that the continuance of the liquor traffic at such four places justified the cancellation of all five certificates, though the law was not violated at the fifth place. Matter of Lyman, (1901) 59 App. Div. 217, 69 N. Y. S. 309.

Acts of one using license.—Where the original holder of a certificate permits another to use it to do business at the designated place, and it does not appear that the relation of principal and agent exists between them, or that the original holder intends or authorizes the use of the certificate in any other than a legal way, if the user traffics in liquor at a place other than that designated in the certificate he acts as to such business simply without a license, and he alone is responsible for the consequences. Matter of Lyman, (1899) 160 N. Y. 96, 54 N. E. 577.

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Business conducted by one other than holder of certificate.—A certificate may be revoked, though the holder is not conducting the business, if he consents that the business be carried on by another under the certificate and the Liquor Tax Law is violated at the premises. Matter of Cullinan, (1903) 39 Misc. 641, 80 N. Y. S. 186, affirmed 84 App. Div. 642, 82 N. Y. S. 1098, affirmed (1904) 177 N. Y. 303.

Stipulation of commissioner that liquors were "legally sold."—Where the commissioner of excise has stipulated that liquors were "legally" sold upon certain premises, the stipulation will be enforced and a proceeding to revoke the certificate on the ground that the traffic was carried on near a hospital as prohibited by section 1 of section 23, fails. Matter of Cullinan, (1906) 113 App. Div. 485, 99 N. Y. S. 374, wherein it was said: "That parties may stipulate what the law is that governs their disputes, as well as what the facts are from which it arises, cannot be doubted. And the courts should and will give as complete effect to the former as to the latter class of stipulations."

Previous conviction unnecessary.— Under the provisions of this section a previous conviction of a violation of the law is not necessary for the maintenance of a proceeding for the revocation of a certificate. Matter of Lyman, (1901) 59 App. Div. 217, 69 N. Y. S. 309. See also Matter of Lyman, (1899) 160 N. Y. 96, 54 N. E. 577, 161 N. Y. 119, 55 N. E. 408; Matter of Halbran, (1900) 30 Misc. 515, 63 N. Y. S. 1024.

Sufficiency of evidence.—Where, on an application for the revocation of a liquor tax certificate for a violation of the Liquor Tax Law, the evidence is equally as consistent with innocence as with wrongdoing, that construction must be placed upon it which will exonerate the holder from a dishonest intent. Matter of Cullinan, (1902) 75 App. Div. 301, 78 N. Y. S. 118.

Alleged club.—Where an alleged club was not organized and is not carried on for ordinary club purposes, and the premises are conducted in such a disorderly manner as to violate the safeguards provided by the law as to the character of places entitled to vend spirituous liquors, a certificate for such club will be revoked. Matter of Lyman, (1898) 1 Liq. Tax Law Rep. 254.

Effect of discharge in criminal prosecution.—The fact that a certificate holder has been discharged in a prosecution for a violation of the Liquor Tax Law, does not bar a proceeding for the revocation of the certificate under this section, though the proceedings are based on the same alleged violation. Matter of Schuyler, (1900) 32 Misc. 221, 66 N. Y. S. 251.

Violation by assignor of certificate.— Where an assignor of a certificate violates the Liquor Tax Law prior to the assignment of the certificate, it will be revoked, though the assignee has no knowledge of the violation at the time he receives the certificate, and though the deputy commissioner of excise consents to the assignment of the certificate at a time when the commissioner of excise has knowledge of the violation. Matter of Cullinan, (1905) 104 App. Div. 205, 93 N. Y. S. 492, affirmed without opinion (1906) 185 N. Y. 546, 77 N. E. 1184; Matter of Cullinan, (1903) 87 App. Div. 47, 83 N. Y. S. 1025. And, if the assignor commits a violation of the law after making an assignment of the certificate, it may be revoked in a proceeding under this section. Matter of Bradley, (1898) 22 Misc. 301, 49 N. Y. S. 1100. But this rule does not hold where the holder of the certificate is not his predecessor's assignee. Matter of Farley v. Kelly, (1916) 217 N. Y. 613, affirming 167 App. Div. 955. See supra, section 26, as to the assignments of certificates and the rights of assignees.

Permitting minors to serve liquors.— If the certificate holder permits a minor under the age of eighteen years to serve liquors on the premises, his certificate will be revoked, though the holder does not knowingly, purposely or with knowledge violate the law. Matter of Clement, (1909) 64 Misc. 439, 119 N. Y. S. 347.

Disorderly premises.— If the holder of a liquor tax certificate permits the

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premises to become disorderly, the certificate may be revoked. Matter of Clement, (1911) 144 App. Div. 156, 128 N. Y. S. 882; Matter of Clement, (1911) 142 App. Div. 930, 126 N. Y. S. 1109; Matter of Cullinan, (1902) 3 Liq. Tax Law Rep. 49. Where a part of certain premises is used as a disorderly house and another part as a saloon, with communication between the two by means of a hallway, the saloon being used as an entrance to the disorderly house, the certificate should be revoked. Matter of Clancy, (1908) 58 Misc. 258, 109 N. Y. S. 644.

The duty is on the certificate holder to see that the premises do not become disorderly; the fact that he has no personal knowledge of their disorderly condition will not be a defense in a proceeding for the revocation of the certificate. Matter of Clement, (1910) 67 Misc. 525, 124 N. Y. S. 814.

Gambling.—A certificate will be revoked in a proceeding under this section, where gambling has been carried on on the premises with the consent of the agent in charge of the premises, though the principal was absent and did not consent to the acts of the agent. Matter of Cullinan, (1903) 88 App. Div. 6, 84 N. Y. S. 492. Compare Matter of Cullinan, (1903) 3 Liq. Tax Law Rep. 109.

Where the certificate holder rents and occupies but one room in a building, his certificate will not be revoked for gambling which is permitted in adjoining rooms over which he has no control. Matter of Clement, (1907) 119 App. Div. 622, 104 N. Y. S. 25, affirmed (1907) 190 N. Y. 523 mem.

As to prohibitions against gambling, see supra, § 21, subd. 7; infra, § 30, subd. E.

Sale at prohibited hours.—A certificate will be revoked where the holder thereof has made an illegal sale of liquor during the period when the sale thereof is prohibited by the provisions of section 30. Matter of Lyman, (1901) 62 App. Div. 616 mem., 70 N. Y. S. 822; Matter of Lyman, (1898) 28 App. Div. 209, 50 N. Y. S. 898. Thus, a certificate will be cancelled for a Sunday sale. Matter of Farley, (1911) 131 N. Y. S. 120; Matter of Peters, (1902) 3 Liq. Tax Law Rep. 39; Matter of Cullinan, (1903) 3 Liq. Tax Law Rep. 251; Matter of Peck, (1901) 2 Liq. Tax Law Rep. 451. The fact that the wrongful sale on Sunday was made by an employee without the consent of the certificate holder, affords no defense to the proceeding. Matter of Clement, (1910) 140 App. Div. 223, 124 N. Y. S. 1084; Matter of Peck, (1901) 2 Liq. Tax Law Rep. 451. Where a sale on Sunday is made by the proprietor of a hotel, the burden is on the holder to show that the sale was made under the circumstances prescribed in section 30, subdivision N, making an exception in certain cases. Matter of Lyman, (1899) 28 Misc. 408, 59 N. Y. S. 968, affirmed 48 App. Div. 275, 62 N. Y. S. 846. In a proceeding under this section for the revocation of a certificate issued to a social club, when it is alleged that a sale was made on Sunday, the burden is upon the club to show that it is a social club within the meaning of section 30, subdivision O, and thus entitled to distribute liquors on Sunday. Matter of Lyman, (1897) 1 Liq. Tax Law Rep. 248; Matter of Lyman, (1897) 1 Liq. Tax Law Rep. 261. A certificate issued to an alleged club will be revoked, where it appears that the club was nothing but a fraudulent scheme concocted to evade the law and permit the sale of liquor at prohibited hours. Matter of Lyman, (1898) 28 App. Div. 209, 50 N. Y. S. 898. See also Matter of Lyman, (1898) 1 Liq. Tax Law Rep. 254.

Sale after surrender of certificate.—If the holder of a certificate sells liquors after surrendering it, it may be canceled in proceedings under this section, and he will lose the rebate. Matter of Lyman, (1899) 26 Misc. 300, 56 N. Y. S. 1020. And see supra, section 24 as to the loss of the rebate on account of a sale after the surrender of the certificate.

Election day.—A certificate will be revoked for an illegal sale of liquor on election day within a quarter of a mile of a polling place. Matter of Cullinan, (1904) 3 Liq. Tax Law Rep. 308.

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Selling liquors to be drunk on premises.— It has been held that a certificate granted under subdivision 2 of section 8 for traffic in liquors not to be drunk on the premises, will not be revoked for a sale of liquors to be drunk on the premises. Matter of Lyman, (1899) 27 Misc. 327, 57 N. Y. S. 888, affirmed 44 App. Div. 507, 60 N. Y. S. 805.

Sale in another room.—Where a certificate holder is authorized to sell in one room in a building, a sale in a room in another building is a violation of the law and requires a cancellation of the certificate. Matter of Cullinan, (1902) 2 Liq. Tax Law Rep. 611.

Obstruction of view into premises at prohibited hours.— If the view into premises where liquors are sold is obstructed during prohibited hours contrary to the provisions of subdivision H of section 30, the certificate will be revoked. Matter of Henry, (1900) 56 App. Div. 268, 67 N. Y. S. 733. See also Matter of Farley, (1911) 131 N. Y. S. 120.

Entrance to barroom on Sunday.—Where the door leading into a barroom is open on Sunday and such door is not necessary for the ingress and egress of the certificate holder or the members of his family or employees, the certificate will be revoked. Cullinan v. Ulmann, (1902) 3 Liq. Tax Law Rep. 57. Where an adjoining saloon and restaurant which has been conducted by different persons, comes under the proprietorship of one, and such person thereupon constructs an adjustable partition on the dividing line which he keeps closed on Sunday, but open on week days, there is no violation of the law and his certificate will not be revoked. Matter of Cullinan, (1904) 90 App. Div. 607, 86 N. Y. S. 1046.

Permitting persons in barroom on Sunday.—Where it clearly appears that the certificate holder admitted persons to his barroom on Sunday, such persons not being servants or members of the family of the certificate holder, the certificate will be revoked. Matter of Cullinan, (1902) 68 App. Div. 119, 74 N. Y. S. 182.

5. Procedure Generally

Constitutionality of procedure.—There is no constitutional objection to the procedure prescribed by this section for the revocation of liquor tax certificates, for a liquor tax certificate is not an absolute property right of the holder and is subject to cancellation without a trial by jury. Matter of Lyman, (1901) 59 App. Div. 217, 69 N. Y. S. 309; Matter of Lyman, (1899) 46 App. Div. 387, 61 N. Y. S. 884, affirmed (1900) 163 N. Y. 552, 57 N. E. 1115; Matter of Livingston, (1897) 24 App. Div. 51, 48 N. Y. S. 989; Matter of Lyman, (1897) 1 Liq. Tax Law Rep. 190. See also Matter of Jennings, (1909) 130 App. Div. 645, 115 N. Y. S. 457.

Jurisdiction.—"The court gets jurisdiction of parties and subject-matter upon service of the petition and order to show cause, although the petition may be made on information and belief." Matter of Cullinan, (1902) 39 Misc. 354, 79 N. Y. S. 840.

Time for application.—The petition for the revocation may be presented at any time during the thirty-day period which is prescribed in section 24, during which the payment of a rebate is suspended after the surrender of a certificate. Matter of Clement, (1908) 57 Misc. 319, 109 N. Y. S. 538. Moreover, it is held that such thirty-day period is not a time limitation for an application to cancel a certificate, and the proceeding may be maintained after the expiration of such period. Clement v. Viscosi, (1909) 63 Misc. 514, 118 N. Y. S. 613; Matter of Clement, (1909) 62 Misc. 512, 116 N. Y. S. 1070; Matter of Clement, (1908) 59 Misc. 367, 112 N. Y. S. 337. But, after the expiration of the term for which the certificate was issued, an application for the revocation thereof cannot be presented. Matter of Farley, (1915) 214 N. Y. 212, 108 N. E. 417, affirming 86 Misc. 543, 149 N. Y. S. 424; Matter of Farley, (1914) 87 Misc. 25, 149 N. Y. S. 307. Contra, Farley v.

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Mehlsack, (1914) 85 Misc. 579, 148 N. Y. S. 1073. See also Matter of Farley, (1914) 88 Misc. 259, 151 N. Y. S. 838. And see Matter of Farley, (1914) 164 App. Div. 802, 150 N. Y. S. 300, holding that a proceeding for the revocation of a certificate on the ground that the premises have become disorderly may be maintained, though the certificate has been forfeited under section 36 by reason of the conviction of employees. While there is no time specified in subdivision 2 of this section for the presentation of a petition, yet it is thought that there must be some limitation to the right, and, as the proceedings are of an equitable nature, laches or want of diligence will be a bar thereto. Matter of Clement, (1910) 122 N. Y. S. 743. But it has been held that a delay of five or six months between the time of a wrongful sale of liquor on Sunday and the time of the presentation of a petition for the revocation of the certificate, does not justify the court in refusing to cancel the certificate. Matter of Clement, (1910) 140 App. Div. 223, 124 N. Y. S. 1084, wherein it was said: "The act of the defendant in permitting sale of liquors upon his premises on Sunday is illegal, and no lapse of time can make that lawful which was originally unlawful."

Expiration of certificate as bar to continuance of proceeding.—The fact that a certificate has expired or is about to expire before the determination of the proceedings for its revocation, affords no bar to a further prosecution of the proceeding. Matter of Farley, (1915) 214 N. Y. 212, 108 N. E. 417, affirming 86 Misc. 543, 149 N. Y. S. 424; Matter of Lyman, (1900) 48 App. Div. 275, 62 N. Y. S. 846, affirming 28 Misc. 408, 59 N. Y. S. 968; Matter of Schuyler, (1900) 32 Misc. 221, 66 N. Y. S. 251; Matter of Van Vleck, (1900) 2 Liq. Tax Law Rep. 330. The question of costs alone requires the continuance of the proceeding after the time limitation of the certificate. Matter of Lyman, (1899) 28 Misc. 408, 59 N. Y. S. 968, affirmed 48 App. Div. 275, 62 N. Y. S. 846.

Where proceeding for the revocation of a certificate on the ground that the holder sold liquor on Sunday contrary to law is commenced before the expiration of the certificate, the fact that the certificate will expire on the day following the trial of the issues, does not justify the court in refusing to try the issues. Matter of Farley, (1914) 161 App. Div. 205, 146 N. Y. S. 473.

By whom prosecuted.—When this section was originally enacted in the Liquor Tax Law of 1896, the proceeding could be initiated by a citizen of the state, though he was not a taxpayer. See Matter of Schopp, (1907) 119 App. Div. 192, 104 N. Y. S. 307; Matter of Halbran, (1900) 30 Misc. 515, 63 N. Y. S. 1024; Matter of Wood, (1899) 2 Liq. Tax Law Rep. 29; Matter of Scott, (1900) 2 Liq. Tax Law Rep. 222. In 1903, this section permitted the proceeding to be maintained by a citizen, but required that the petition have indorsed thereon or attached thereto the written consent of the commissioner of excise that the proceeding be prosecuted. Under such a provision, when the consent was qualified by several conditions and the petitioner failed to perform one of such conditions, the proceeding would be dismissed. Matter of Weigle, (1903) 3 Liq. Tax Law Rep. 206. At a later period in the evolution of this section, citizens were not permitted to maintain the proceeding unless they were taxpayers. When such was the law, it was held that executors and testamentary trustees in whom real estate was vested, were taxpayers and entitled to maintain the proceeding. Matter of Rupp, (1907) 54 Misc. 1, 105 N. Y. S. 467. And an allegation in a petition that the petitioner was the owner of real estate in the city for which the certificate was issued, was thought to be a sufficient allegation that he was a taxpayer. Matter of Schopp, (1907) 119 App. Div. 192, 104 N. Y. S. 307. Now, the right to commence the proceeding is limited to certain public officers and taxpayers having property within three hundred feet of the liquor premises. The petition is fatally defective if it does not allege that the petitioner is

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one of the persons authorized to file it. People v. McGowan, (1899) 44 App. Div. 30, 60 N. Y. S. 407.

Against whom prosecuted.—Though an assignee of a liquor tax certificate may be entitled to intervene in a proceeding for its cancellation, he is not a necessary party and the proceeding may be maintained with notice only to the original holder of the certificate. Clement v. Viscosi, (1909) 63 Misc. 514, 118 N. Y. S. 613. But see Nieland v. McGrath, (1899) 29 Misc. 682, 62 N. Y. S. 760, holding that an assignee cannot be brought in as a party to the proceeding, and that if the certificate has been assigned before the commencement of the proceeding, a dismissal of the proceeding must be had.

A proceeding for the revocation of a certificate may be maintained without making one a party who has an interest in the certificate by way of an assignment to secure a loan. Matter of Clement, (1907) 55 Misc. 615, 105 N. Y. S. 1085. Where the applicant for a certificate assigns the same to a brewing company as collateral security for a loan to pay the tax, the applicant and not the brewing company is the holder of the certificate against whom the proceeding shall be maintained. Matter of Lyman, (1899) 26 Misc. 300, 56 N. Y. S. 1020.

A writ of prohibition cannot issue to forbid the Special Term and the commissioner of excise from proceeding under subdivision 2 of this section, though the owner of the premises is not a party to the proceeding and the revocation of the certificate will prevent the use of the premises for the sale of liquor for one year. People v. Special Term of Supreme Court, (1910) 137 App. Div. 765, 122 N. Y. S. 573.

Intervention.—Where the holder of a certificate has ceased traffic in liquors at the premises mentioned in the certificate and an assignee of the certificate has surrendered the same and received the duplicate receipts provided for in section 24 and made a petition for the rebate moneys, such assignee should be allowed to intervene in a proceeding under this section for the revocation of the certificate. Matter of Cullinan, (1904) 94 App. Div. 445, 88 N. Y. S. 164. See also Clement v. Viscosi, (1909) 63 Misc. 514, 118 N. Y. S. 613.

This section does not require that the owner of premises for which a certificate has been issued or the landlord of the holder be made a party to the proceeding, but, inasmuch as under subdivision 4 of section 23 the revocation of the certificate may bar the issuance of a new certificate for a period of one year, they may have property interests which will be adversely affected by the revocation of the certificate, and the court may permit them to intervene. And the court will permit the lessee of the holder, he being the owner of the fixtures but not the owner of the real estate, to intervene. Matter of Jennings, (1909) 130 App. Div. 645, 115 N. Y. S. 457. Though ordinarily the application of a lessee of part of the premises affected by a revocation proceeding may be permitted to intervene, if such lessee has made such an application and it has been denied and the lessee has abandoned his appeal from the decision, a subsequent motion to intervene made by him after the determination of the matter and the entry of the order of revocation, will be denied. Matter of Conry, (1909) 64 Misc. 625, 119 N. Y. S. 1008.

One intervening in a proceeding to cancel a certificate should be required to interpose an answer; and, if he puts in issue any of the material allegations of the petition, he should be permitted to participate in the hearing and to present any material evidence, and to contest the proceeding in all its stages, including the right to appeal; and the court should be able to regulate and control the practice so that there will be no undue delay. Intervening parties are not entitled to a trial by jury of the issues involved in the proceeding. Those who are admitted into the proceeding on their own application take the proceeding as they find it, and are bound by the same procedure and must submit their rights to adjudication by the tribunal prescribed by the legislature for the trial and decision of the questions. Matter of Jennings, (1909) 130 App. Div. 645, 115 N. Y. S. 457.

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Order.— In Matter of Judkins, (1908) 126 App. Div. 524, 110 N. Y. S. 587, an order to show cause why a certificate should not be revoked was made returnable at "a regular term of the Supreme Court" which was held by a justice at a trial term at the return date in the order, but it was held that the order could be construed as being returnable before the justice and that the naming of the term was merely an indication of the place where the justice would hear the motion. The order must be returnable not more than ten days from the granting thereof; if it is made returnable more than ten days thereafter, there is no jurisdiction to cancel the certificate. Matter of Moser, (1897) 16 App. Div. 379, 44 N. Y. S. 1124; Matter of Halbran, (1899) 2 Liq. Tax Law Rep. 154.

Service of order.—Where the original holder of the certificate has assigned the same and the assignee has taken possession thereof, the service of the order to show cause may be made on such assignee. Matter of Lyman, (1900) 53 App. Div. 330, 65 N. Y. S. 673.

Where the order to show cause why a certificate should not be revoked directs that a copy of the order and petition and affidavit shall be served personally upon the holders of the certificate, who compose a partnership, by leaving the same at the place of business designated in the liquor tax certificate with the person in charge of the same, and service is made upon the person so in charge of the premises, pursuant to which service one of the members of the firm appears, it is held that the service is sufficient to give the court jurisdiction to cancel the certificate as against both members of the firm, though the other member does not appear except specially for the purpose of objecting to the jurisdiction of the court. Matter of Cullinan, (1902) 68 App. Div. 119, 74 N. Y. S. 182.

Adjournment.— If the return day of the order to show cause is not more than ten days from the granting of the order, and service has been made on all the parties except the certificate holder, an adjournment of the proceedings may be had. Matter of Lyman, (1899) 28 Misc. 385, 59 N. Y. S. 971.

Where the order to show cause was served on the assignee of the certificate, but not on the original holder, and upon the return day the assignee appeared and, without objection on the part of the assignee, the proceeding was adjourned for ten days on the ground that the original holder had not been served, and subsequently an ex parte order was granted extending the return day of the original show cause order for such ten days, the court did not lose jurisdiction of the proceeding, but the same could be determined as against the rights of the assignee. Matter of Lyman, (1900) 53 App. Div. 330, 65 N. Y. S. 673.

Referee to hear evidence.—Prior to 1905, the court had power to order a reference in proceedings under this section to revoke a certificate, for the statute expressly permitted such practice; and, moreover, it was held that the court had inherent power to appoint a referee in special proceedings of this nature. Matter of Cullinan, (1904) 97 App. Div. 122, 89 N. Y. S. 683, affirmed without opinion (1905) 181 N. Y. 527, 73 N. E. 1122; Matter of Cullinan, (1904) 93 App. Div. 540, 87 N. Y. S. 817. See also Cullinan v. Sabatino, (1906) 49 Misc. 442, 99 N. Y. S. 977; Matter of Cullinan, (1902) 2 Liq. Tax Law Rep. 639. But an amendment to this section in 1905, eliminating the express provisions relative to the appointment of a referee, has been held to divest the court of all power to order a reference in these proceedings. Matter of Clement, (1907) 187 N. Y. 274, 79 N. E. 1003, in effect overruling Matter of Lawson, (1905) 109 App. Div. 195, 96 N. Y. S. 33; Matter of Cullinan, (1905) 109 App. Div. 816, 96 N. Y. S. 751.

Injunction against traffic.— On the return of an order to show cause under this section, an injunction restraining traffic under the certificate will not be granted, where a five days' notice of the application for the injunction has not been given. Matter of Farley, (1913) 81 Misc. 481, 142 N. Y. S. 672.

Subpoena duces tecum for papers in office of commissioner.— In a proceeding under this section for the revocation of a certificate, the commissioner of

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excise may be required to produce under a subpoena duces tecum the reports of special agents made to him on which the proceeding is based, but not complaints made to him by citizens concerning the holder of the certificate. Matter of Green, (1915) 92 Misc. 503, 157 N. Y. S. 87.

Abatement.— The death of a petitioner in a proceeding for the revocation of a certificate and the consequent abatement of the proceeding, does not bar a new proceeding by another petitioner. Matter of Halbran, (1900) 30 Misc. 517, 63 N. Y. S. 1026.

Discontinuance.—A motion for the discontinuance of revocation proceedings may be made by the petitioner, whether a private person or the commissioner of excise, but a motion for discontinuance cannot be made by the accused person against the consent of the petitioner. Matter of Cullinan, (1903) 39 Misc. 558, 79 N. Y. S. 582.

Stay of proceedings.— The proceeding for the revocation of a certificate is of a summary nature, and is intended immediately to stop persons from selling liquor who have not the lawful right to do so. Hence, after the proceeding has been decided in favor of the petitioner, and an order for the revocation of the certificate has been served on the holder, the court will not generally stay proceedings pending an appeal by the holder. Matter of Washburn, (1900) 32 Misc. 303, 66 N. Y. S. 732; Matter of Auerbach, (1900) 31 Misc. 46, 64 N. Y. S. 603. But there is authority for a stay of proceedings pending an appeal to the Appellate Division, on condition that the appeal be argued at the next term and that security be given for the costs and disbursements of the appeal. Matter of Moulton, (1900) 2 Liq. Tax Law Rep. 413.

A stay of proceedings for the revocation of a certificate will not be granted on the ground that an action is pending on the bond under section 16, which action is based on the same violations as are alleged in the revocation proceedings. Matter of Lyman, (1900) 32 Misc. 621, 67 N. Y. S. 502.

Function of appellate court.—Where, on a question of fact, the trial court has found that the applicant for a certificate made a false statement, and the conclusion of the trial court is supported by evidence, the Appellate Court will not generally interfere. Farley v. Moran, (1914) 162 App. Div. 800, 147 N. Y. S. 692.

Res adjudicata.—A prior proceeding for the cancellation of a liquor tax certificate which resulted in favor of the certificate holder, is not a bar to a subsequent proceeding by another petitioner, where the first proceeding was based upon a statement of stipulated facts. Matter of McCusker, (1900) 47 App. Div. 111, 62 N. Y. S. 201.

Unsuccessful proceeding as bar to action on bond for same violation.—A proceeding under this section which results in a decision for the certificate holder upon the merits, is a bar to an action by the commissioner on the bond under section 16 for the same alleged violation. Clement v. Moore, (1909) 135 App. Div. 723, 119 N. Y. S. 883.

Injunction under section 28.—The fact that there is a proceeding pending for the revocation of a certificate under this section, does not bar a proceeding by the same person for an injunction under section 28. Matter of Harper, (1899) 2 Liq. Tax Law Rep. 178.

Right to question power of attorney to file abandonment.— On a proceeding for the cancellation of a liquor tax certificate, the power of an attorney for the holder of another certificate for the same premises to execute and file a notice of abandonment thereunder must be conclusively presumed. Matter of Green, (1916) 171 App. Div. 583, 157 N. Y. S. 736.

6. Petition

Petition as pleading.—" The petition of the commissioner is in the nature of a pleading." Matter of Clement, (1906) 116 App. Div. 148, 101 N. Y. S. 683.

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Information and belief.—A petition on information and belief, without a statement of the sources of the information or the grounds of the petitioner's belief, is insufficient. Matter of Peck, (1901) 167 N. Y. 391, 60 N. E. 775, 53 A. S. R. 888, wherein it was said: "When the law requires that the facts shall be stated, as the basis of a summary proceeding to forfeit the right to carry on business by reason of acts which constitute a crime, it is not complied with by the presentation of a petition, every allegation of which is upon information and belief. The liberty and property or personal rights of the citizen have practically no protection if they can be taken away or destroyed by such a proceeding on the part of one who is willing to become a party to such a controversy, and without producing any proof whatever of the acts constituting the offense charged. The least that should be required in such a case is that the petition should state the facts positively upon oath, unless the statute expressly permits a statement upon information and belief, and this statute does not." And see to the same effect Matter of Farley, (1914) 212 N. Y. 299, 106 N. E. 57. But while a petition wholly on information and belief is insufficient, a petition which is accompanied by affidavits stating the facts upon personal knowledge and which refers to such affidavits as the source of the petitioner's information, is sufficient. Matter of Farley, (1914) 212 N. Y. 299, 106 N. E. 57; Matter of Clement, (1906) 116 App. Div. 148, 101 N. Y. S. 683; Matter of Cullinan, (1903) 40 Misc. 423, 82 N. Y. S. 337; Matter of Cullinan, (1902) 39 Misc. 354, 79 N. Y. S. 840. "It is necessary by the express terms of the statute to state in the petition the facts upon which the application for the revocation of the liquor tax certificate is based. A petition upon information and belief is wholly insufficient. . . . Such a petition may be supplemented by affidavits annexed thereto and referred to therein, in which the facts upon which the petition is based are positively stated. . . . The petition including the accompanying affidavits, if any, making up the application under the statute must apprise the certificate holder of the facts on which the application is based and evidence can be given upon the trial so far as the facts are fairly called to the attention of the certificate holder by the application but not otherwise." Matter of Farley, (1914) 212 N. Y. 299, 106 N. E. 57. While it is true that mere allegations on information and belief unsupported in any way may be ineffectual to set the court in motion in a proceeding of this character . . . yet it has not been thus far held that where the sources of information are disclosed and particular reference is made to those sources and where proof is presented in or with the petition of the existence of facts which prima facie entitle the petitioner to the relief demanded, such petition is insufficient to invoke the action of the court." Matter of Clement, (1906) 116 App. Div. 148, 101 N. Y. S. 683. A petition by the commissioner of excise, though made on information and belief, is sufficient, where it is accompanied by the affidavits of two men, which affidavits are made a part of the petition and which minutely detail upon personal knowledge the facts on which the petition is based. Matter of Cullinan, (1902) 76 App. Div. 362, 78 N. Y. S. 466, affirmed without opinion (1903) 173 N. Y. 610, 66 N. E. 1106. And a petition by the commissioner stating the material facts on information and belief is sufficient, if it discloses the source of his information and the grounds of his belief as being the public records of his office and of the office of the special deputy commissioner of excise, and also the affidavits of certain persons which are attached to the petition and made a part thereof. Matter of Cullinan, (1903) 41 Misc. 392, 84 N. Y. S. 1075, affirmed 89 App. Div. 613. Even though the petition is insufficient in that it is upon information and belief without a sufficient statement of the sources of the petitioner's information and the grounds of his belief, if a trial is had upon the merits without objection to the insufficiency of the petition, the question cannot be subsequently raised. Matter of Farley, (1916) 217 N. Y. 105, 171 N. E. 479. And, moreover, it has been held that the failure of the certificate holder to

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raise the question of the insufficiency of the petition by answer, precludes him from raising it on the trial. Matter of Stedler, (1907) 52 Misc. 322, 102 N. Y. S. 147.

Statement of authority to make petition.— Only the public officers and taxpayers named in this section are authorized to make a petition for the revocation of a liquor tax certificate, and the petition is fatally defective if it does not allege that the petitioner is one of such persons authorized to make the petition. People v. McGowan, (1899) 44 App. Div. 30, 60 N. Y. S. 407

Verification.—The Liquor Tax Law contains no direction as to what shall be stated in the verification to a petition for the revocation of a liquor tax certificate, and therefore the matter is governed by the Code of Civil Procedure. People v. McGowan, (1899) 44 App. Div. 30, 60 N. Y. S. 407.

Amendment of petition.—The petitioner may move at special term for the amendment of a petition to conform to the proof, but the Appellate Division cannot amend the petition, or deem it amended, so as to conform to the proof, for the purpose of reversing the order appealed from. Matter of Plass, (1902) 71 App. Div. 488, 76 N. Y. S. 2, affirmed on opinion below (1903) 175 N. Y. 524, 67 N. E. 1089.

Statement of facts, not conclusions.—A petition which states that the certificate holder made a false answer to "question 16" in the application, but does not state what such question was or what the answer thereto was and does not have it attached to the petition the original statement or a copy thereof, is insufficient. Matter of Halbran, (1900) 30 Misc. 515, 63 N. Y. S. 1024.

Consideration of charges not alleged in petition.—The requirement of this section that the petition for a revocation of a certificate shall state the facts upon the application is based, implies that no charges are to be considered upon which the hearing except such as are contained in the petition as originally framed, or such as may properly be introduced by amendment in the course of the proceeding. Matter of Plass, (1902) 71 App. Div. 488, 76 N. Y. S. 2, affirmed on opinion below (1903) 175 N. Y. 524, 67 N. E. 1089; Matter of Johnston, (1897) 1 Liq. Tax Law Rep. 167. Upon an appeal from an order dismissing his petition, the petitioner is not in a position to urge grounds for the cancellation of the certificate which were not set forth in his petition. Matter of Purdy, (1899) 40 App. Div. 133, 57 N. Y. S. 629.

Variance.— Evidence of an occurrence or conversation which is independent of the one described or narrated upon knowledge in an application, should not be received; but the testimony of an occurrence described or of a conversation narrated in an application should not be rejected so long as it is confined generally to the particular facts upon which the application is based, and the variance, if any, is of detail and not such as to make the statement of fact in the application misleading. Matter of Farley, (1914) 212 N. Y. 299, 106 N. E. 57.

7. *Answer*

Verified answer an unconstitutional requirement.—A provision in the Liquor Tax Law of 1896 as amended in 1900 and 1901, requiring the holder of a certificate, in a proceeding for the revocation thereof, to interpose a verified answer, was held unconstitutional. Matter of Peck, (1901) 167 N. Y. 391, 60 N. E. 775, 53 L. R. A. 888, wherein it was said: "It is the constitutional right of the party charged with the commission of acts which, if true, constitute a crime or create a penalty or impose a forfeiture to answer without verification. No law can be valid which directly or indirectly compels a party to accuse or incriminate himself or to testify by affidavit or otherwise with respect to his guilt or innocence. In every case when he elects to remain silent with respect to any charge involving unlawful acts which are criminal

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or subject him to a penalty or forfeiture, that is a constitutional privilege which the legislature may not invade. The courts have insisted upon giving to the constitutional provision a construction broad and liberal enough to permit a citizen to remain entirely silent with respect to the truth or falsity of any criminal charge against him, if he so elects, and his right to refuse to verify a pleading is as clearly within the privilege as his right to refuse to testify." And see the following cases as to the unconstitutionality of the requirement: Matter of Cullinan, (1904) 97 App. Div. 122, 89 N. Y. S. 683, affirmed without opinion (1905) 181 N. Y. 527, 73 N. E. 1122; Matter of Cullinan, (1903) 82 App. Div. 445, 81 N. Y. S. 567; Matter of Cullinan, (1903) 41 Misc. 392, 84 N. Y. S. 1075, affirmed 89 App. Div. 613; Matter of Cullinan, (1903) 40 Misc. 423, 82 N. Y. S. 337. The unconstitutionality of this requirement, however, did not affect the validity of the remainder of the section, as it existed before the amendment requiring such verification. Matter of Cullinan, (1904) 97 App. Div. 122, 89 N. Y. 683, affirmed without opinion (1905) 181 N. Y. 527, 73 N. E. 1122; Matter of Cullinan, (1903) 40 Misc. 583, 83 N. Y. S. 9. Where the certificate holder put in a verified answer pursuant to the statute, he was deemed to have waived the constitutional question; and thereafter he could not complain. Matter of Cullinan, (1902) 76 App. Div. 362, 78 N. Y. S. 466, affirmed without opinion (1903) 173 N. Y. 610, 66 N. E. 1106. In 1903, the statute was again amended so as to eliminate the provisions relative to a verified answer and thus bring the statute in accord with the constitution. Matter of Cullinan, (1903) 41 Misc. 392, 84 N. Y. S. 1075, affirmed 89 App. Div. 613.

Default of certificate holder.— On the return of an order to show cause issued under subdivision two for the revocation of a certificate, a holder who fails to answer or show cause is in an attitude similar to that of a defendant in a suit who fails to answer a complaint, but judgment cannot be taken without proof of the facts stated in the petition. Matter of Clement, (1906) 116 App. Div. 148, 101 N. Y. S. 683. Although no answer is interposed by the certificate holder, the certificate will not be canceled without proof of the facts. Matter of Cullinan, (1903) 41 Misc. 392, 84 N. Y. S. 1075, affirmed 89 App. Div. 613; Matter of Cullinan, (1902) 39 Misc. 354, 79 N. Y. S. 840.

Denial of knowledge.— In a proceeding for the revocation of a certificate, a denial by the certificate holder of any knowledge or information sufficient to form a belief as to whether the petitioner is the commissioner of excise, does not raise an issue; and the proceeding should not be reversed because the petitioner fails to prove that he is the commissioner of excise. Matter of Clement, (1909) 132 App. Div. 598, 117 N. Y. S. 30. But a denial of knowledge or information sufficient to form a belief as to the violations alleged in the petition, puts the petitioner to his proof thereof. Matter of Plass, (1900) 2 Liq. Tax Law Rep. 349.

8. Costs

As in a special proceeding.—A proceeding for the revocation of a liquor tax certificate is a special proceeding, and thus costs are taxed under section 3240 of the Code of Civil Procedure. Matter of Loper, (1900) 32 Misc. 534, 67 N. Y. S. 329. The award in such a proceeding is, therefore, discretionary. Matter of Clement, (1907) 57 Misc. 47, 107 N. Y. S. 205.

Same costs as in action.— In a cancellation proceeding, if the petitioner is successful on the trial of the issues, he will be allowed the same costs as are allowed a successful plaintiff in an action. Matter of Young, (1910) 66 Misc. 216, 122 N. Y. S. 1116. Costs may be awarded in such sums as in the discretion of the justice may be deemed proper, but the measure of costs must be limited as in an action to the items authorized by section 3251 of the

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Code of Civil Procedure. Costs include disbursements under section 3256 of the Code of Civil Procedure, but nothing further will be allowed in absence of an express provision for an award of an allowance in addition to the costs. Matter of Feist, (1900) 2 Liq. Tax Law Rep. 296.

Good faith.—Where a certificate is revoked because the consents attached to the application were not signed by the proper persons, the fact that the holder acted in good faith may be considered on the question of costs, and the court may refuse to allow costs against him. Lyman v. Murphy, (1900) 33 Misc. 349, 68 N. Y. S. 490; Matter of Miller, (1900) 2 Liq. Tax Law Rep. 330. In a proceeding to revoke a certificate on the ground that the consents required by section 15, subdivision 8, were not attached to the application, the Appellate Division will affirm an order revoking the certificate without costs, where the certificate holder relied on consents filed in connection with a prior application and the state and property holders did not investigate the sufficiency of the consents during the life of an earlier certificate and thereby suffered a subsequent applicant to be misled by appearances. Matter of Bullard, (1906) 113 App. Div. 159, 98 N. Y. S. 1011.

Payment of costs against county treasurer out of excise moneys.—There is no authority for an order of the court directing that costs awarded against a county treasurer in a proceeding for the cancellation of a certificate, be paid out of the excise moneys received by him. Matter of Seymour, (1900) 47 App. Div. 320, 62 N. Y. S. 25.

Liability of surety for costs.—A surety on the bond of a certificate holder is not liable for costs which are awarded to a private individual proceeding under this section for the revocation of a certificate. People v. United Surety Co., (1907) 120 App. Div. 655, 105 N. Y. S. 72.

§ 28. Injunction for unlawful trafficking in liquors or without liquor tax certificate. If any person shall unlawfully traffic in liquor without obtaining a liquor tax certificate, as provided by this chapter, or shall traffic in liquors contrary to any provision of this chapter, the state commissioner of excise, the deputy commissioner, or any taxpayer residing in the city, borough, village or town, may present a verified petition to a justice of the supreme court of a special term of the supreme court of the judicial district in which such county is situated, or the county court or judge of the county in which such traffic in liquors is carried on, for an order enjoining such person from trafficking in liquor thereafter. Such petition shall state the facts upon which such application is based. Upon the presentation of the petition, the justice, judge or court shall grant an order requiring such person to appear before such justice, judge or court, or before a special term of the supreme court of the judicial district, on the day specified therein, not more than ten days after the granting thereof, to show cause why such person should not be permanently enjoined from trafficking in liquor, until a liquor tax certificate has been obtained, in pursuance of law, or why such person should not be permanently enjoined from trafficking in liquors contrary

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to the provisions of this chapter. A copy of such petition and order shall be served upon the person, in the manner directed by such order, not less than five days before the return day thereof. On the day specified in such order, the justice, judge or court before whom the same is returnable shall hear the proofs of the parties, and may, if deemed necessary or proper, take testimony in relation to the allegations of the petition. If the justice, judge or court is satisfied that such person has unlawfully trafficked in liquor without having obtained a liquor tax certificate, as provided by this chapter, or contrary to the provisions of this chapter, an order shall be granted enjoining such person from thereafter trafficking in liquor, contrary to the provisions of this chapter, or without obtaining a liquor tax certificate. If, after the entry of such order in the county clerk's office of the county in which the principal place of business of the corporation, association or copartnership is located, or in which the person so enjoined resides or trafficks, and the service of the copy thereof upon such person, or such substituted service as the court may direct, such person shall, in violation of such order, traffic in liquor, such traffic shall be deemed a contempt of court and punishable in the manner provided by the judiciary law. Costs upon the application for such injunction may be awarded in favor of and against the parties thereto in such sums as in the discretion of the justice, judge or court before whom or which the petition is heard may seem proper. No proceeding under this section shall be taken, however, for a violation of section nineteen of this chapter, against any holder of a liquor tax certificate who shall have made proper application for a new certificate, during the days of grace allowed under the provisions of said section nineteen.

This section was derived from the Liquor Tax Law of 1896, § 29, as amended by L. 1897, ch. 312, § 20, and L. 1908, ch. 350, § 9. It was amended to read as above by L. 1909, ch. 281, § 9. The amendment struck out "corporation, association, copartnership or" before "person" in various places throughout the section and inserted "whom or" in next to last sentence.

Section 28 of the Liquor Tax Law of 1896 is now covered by section 27.

Persons not allowed to traffic in liquor: see supra, § 21. *Places in which traffic shall not be permitted:* see supra, § 23. *Revocation of certificate:* see supra, § 27. *Action on bond for violation of law:* see supra § 16. *State commissioner to be made party to all injunction proceedings under the section:* see supra, § 3.

Sale of intoxicating liquors as public nuisance per se: see 14 Ann. Cas. 36 note. *Remedy in equity for wrongful issuance of license for sale of intoxicating liquor:* see L. R. A. 1915E 408 note. *Injunction by municipal corporation against sale of, as nuisance:* see 41 L. R. A. 321 note. *Injunction against*

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bringing intoxicating liquor into prohibition district: see 35 L. R. A. (N. S.) 879 note.

Nature of proceeding.—The proceeding under this section should be considered as a penal proceeding. Matter of Wheaton, (1904) 96 App. Div. 102, 88 N. Y. S. 1074.

Power of court.—The procedure for the issuance of an injunction is established by the statute, and exists only by its authority; and the power which the court has to issue an injunction is derived solely from it. Matter of Hillard, (1898) 25 App. Div. 222, 49 N. Y. S. 286, affirmed without opinion (1898) 155 N. Y. 702, 50 N. E. 1118.

Traffic under certificate wrongfully issued.—An injunction may be granted under this section to restrain traffic, not only where no certificate has been issued, but also where a certificate for the premises has been revoked for permitting the premises to become disorderly and another certificate has been issued for the premises within one year contrary to the provisions of section 23, subdivision 3. Matter of Farley, (1912) 149 App. Div. 637, 134 N. Y. S. 397. An injunction may be granted to restrain the trafficking in liquors at certain premises, where a prior holder of a certificate for such premises was convicted of permitting the premises to become disorderly; and this is true though the conviction was not had until after the issuance of the subsequent certificate. Matter of Farley, (1915) 170 App. Div. 164, 155 N. Y. S. 869. And see Matter of Farley, (1912) 151 App. Div. 456, 135 N. Y. S. 869.

Pendency of another proceeding.— It is no bar to a proceeding under this section for an injunction that there is a prior proceeding pending for the cancellation of the certificate under section 27, although both proceedings are based on the same alleged violation of law. Matter of Harper, (1899) 2 Liq. Tax Law Rep. 178.

Petition.—The language of this section as to the contents of the petition, being similar to the language of the section relative to the revocation of certificates, is presumably intended to convey the same meaning; and hence, a petition on information and belief is generally insufficient if there is not attached thereto affidavits of persons having personal knowledge of the facts and the absence of such affidavits is unexplained. Matter of Wheaton, (1904) 96 App. Div. 102, 88 N. Y. S. 1074.

Delay in presenting petition.— The proof of the violation of the statute should be reasonably near the date when the relief is asked; and evidence of a few sales in June is too remote to establish a violation of the statute at the time of the presentation of the petition in September. Matter of Hunter, (1901) 34 Misc. 389, 69 N. Y. S. 908, affirmed 59 App. Div. 626, 69 N. Y. S. 1137.

Bill of particulars.— In a proceeding for an injunction under this section, a bill of particulars will not be ordered for the disclosure of the names of the defendant's employees, as such names must be better known to the defendant than to the plaintiff. Warren v. Wier, (1899) 2 Liq. Tax Law Rep. 200.

Reference.—Where the affidavits on an application for an injunction and the affidavits opposing the application are conflicting, the issue of fact may be sent to a referee in aid of the conscience of the court, instead of being decided on the conflicting affidavits. Warren v. Wier, (1899) 2 Liq. Tax Law Rep. 200.

Removal of grounds after commencement of proceeding.— It has been held that an injunction would not be granted on the ground that the bedrooms in an alleged hotel were not sufficient to comply with the requirements of section 30, subdivision N, where the structural conditions were remedied after the commencement of the proceeding so as to obviate the difficulty; nor would the injunction be granted on the ground that the holder maintained a gambling device, where such device was removed before the decision. Matter of Locklin, (1899) 2 Liq. Tax Law Rep. 57; Matter of Locklin, (1899) 2 Liq. Tax Law Rep. 63.

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Scope of order.—An injunction against the soliciting, procuring or accepting of orders for liquors in a town in which liquor tax certificates are prohibited, should prohibit such acts only in the town which has voted against the issuance of certificates and should not prohibit the selling of liquor to a person who chances to reside in such a town if the transaction is had outside of the town. Merrihew v. Cuneo, (1911) 143 App. Div. 862, 128 N. Y. S. 755, affirmed without opinion (1912) 205 N. Y. 592, 98 N. E. 1108.

Cited.— People v. Manganaro, (1912) 76 Misc. 293, 137 N. Y. S. 82.

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§ 29. Persons to whom liquor shall not be sold or given away. No corporation, association, copartnership or person, whether taxed under this chapter or not, shall sell, deliver or give away or cause or permit or procure to be sold, delivered or given away any liquors to:

1. Any minor under the age of eighteen years; nor to such minor for any other person;

2. To any intoxicated person;

3. To any habitual drunkard;

4. To any Indian;

5. To any person to whom such corporation, association, copartnership or person may be forbidden to sell by notice in writing from the parent, guardian, husband, wife or child of such person over sixteen years of age, or by a magistrate or overseer of the poor, peace officer or constable [1] of the town, or by the mayor or chief of police of a city; provided, however, that such notice in writing by a magistrate or overseer of the poor of the town shall apply only in the case of a person who is wholly or partly a charge upon the town, which fact shall be stated in such notice; and that such notice in writing by the mayor, [2] chief of police of a city or constable or peace officer [3] shall apply only in the case of a person who has been convicted of a felony or misdemeanor five or more times, which fact shall be stated in said notice;

6. To any person confined in or committed to a state prison, jail, penitentiary, house of refuge, reformatory, protectory, industrial school, asylum or state hospital, or any inmate of a poor house, or any patient in any colony or institution established for the care or treatment of epileptics, or any patient affected with tuberculosis in a camp, colony or hospital established by state, county or municipal authority and under the manage-

[1] Words "peace officer or constable" new.
[2] Word "or" omitted.
[3] Words "or constable or peace officer" new.

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ment and control thereof,[1] except upon a written prescription from a physician to such institution, colony, camp or hospital,[2] specifying the cause for which such prescription is given, the quantity and kind of liquor which is to be furnished, the name of the person for whom and the time or times at which the same shall be furnished. Such prescription shall not be made unless the physician is satisfied that the liquor furnished is necessary for the health of the person for whose use it is prescribed, and that fact must be stated in the prescription.

This section was derived from the Liquor Tax Law of 1896, § 30, as amended by L. 1897, ch. 312, § 21, and L. 1907, ch. 460 § 1. It was amended to read as above by L. 1910, ch. 307, and L. 1915, ch. 227. The amendments by L. 1910 affected subdivision 6 and are given in the footnotes to that subdivision. The amendments by L. 1915 affected subdivision 5 and are given in the footnotes to that subdivision.

Section 29 of the Liquor Tax Law of 1896 is now covered by section 28.

Other illegal sales: see infra, § 30. *Places in which traffic in liquor shall not be permitted:* see supra, § 23. *Sales of liquor to United States cadets at or near West Point:* see infra, § 30a. *Penalty for violation of this section,* see infra, §§ 36, 43. *Revocation of certificate for violation of law:* see supra, § 27. *Action on bond for violation of law:* see supra, § 16. *Recovery of damages in civil action:* see infra, § 42.

Procuring liquor for persons to whom sale is forbidden: see PENAL LAW, § 1912. *Pawns or pledges for liquor sold to Indians:* see INDIAN LAW, § 4. *Employment of children in distillery, brewery, or establishment where malt alcoholic liquors are manufactured, packed, wrapped or bottled:* see LABOR LAW, § 93, subd. 2. *Selling or giving liquor to children:* see PENAL LAW, § 484. *Permitting children in any place where spirituous or malt liquors are sold or given away:* see PENAL LAW, §§ 484, 486.

Constitutionality of statute prohibiting giving away of liquors: see 13 Ann. Cas. 736 note. *Validity of statutory regulations as to frequenting saloons by, and selling or giving liquors to, certain persons:* see 13 Ann. Cas. 491 note, 3 Ann. Cas. 325 note.

Validity, construction, and effect of statutes regulating admission of minors to saloons: see 22 L. R. A. (N. S.) 1007 note. *Statutory prohibition against furnishing liquor to minors as applicable to giving liquors:* see 4 Ann. Cas. 1063 note. *Criminal liability for sale of liquor to minors by partners, agents or servants:* see 41 L. R. A. 666 note. *Liability for sale of liquor to minor purchasing for another:* see the following notes: 6 Ann. Cas. 867, 21 Ann. Cas. 187; 25 L. R. A. (N. S.) 178; 3 L. R. A. (N. S.) 1196. *Sale of intoxicating liquors to minors for medicinal purposes:* see 3 Ann. Cas. 840 note. *Seller's ignorance of minority of purchaser as defense to prosecution for sale of intoxicating liquor to minor:* see 25 L. R. A. (N. S.) 669 note; 18 Ann. Cas. 437 note. *Effect on liability under liquor dealer's bond of his ignorance of purchaser's minority:* see 25 L. R. A. (N. S.) 801 note.

Indians as subject to state regulation with respect to intoxicating liquors: see Ann. Case. 1915D 372 note. *Validity and construction of statute forbidding sale of liquor to Indians:* see Ann. Cas. 1912B 1090 note. *Regulation*

[1] Word "or any patient affected with tuberculosis in a camp, colony or hospital established by state, county or municipal authority and under the management and control thereof," new.

[2] Words "colony, camp or hospital," new.

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by state of use of intoxicating liquors on Indian reservation: see Ann. Cas. 1914B 653 note.

Penal Law prohibiting distribution of liquor to child under 16.— Since 1889, there has been a provision in the Penal Law [section 484, subdivision 4] prohibiting the sale or gift to a child actually or apparently under the age of 16 years, of beer, ale, wine, or any strong or spirituous liquor. It has been held that the enactment of the Liquor Tax Law of 1896 did not repeal the section of the Penal Law referred to. People v. Koenig, (1896) 9 App. Div. 436, 41 N. Y. S. 283.

Belief that purchaser is over eighteen.— In a prosecution for a sale of liquor to a boy under eighteen years of age, the fact that the defendant acted in good faith, believing that the boy was over the age, is immaterial and affords no defense. People v. Werner, (1903) 174 N. Y. 132, 66 N. E. 667, wherein it was said: "The law on that subject seems to be that an act malum prohibitum is not excused by ignorance, or a mistake of fact when a specific act is made by law indictable irrespective of the defendant's motive or intent."

Declarations that minor is over eighteen.—While, in a prosecution for a sale of liquor to a minor under eighteen, the belief of the defendant that the boy was over eighteen is no defense, yet evidence of declarations by the father of the boy that his age was over eighteen may be admissible upon other grounds. Thus, when the only proof of the age is the testimony of his father, the defendant may ask him upon cross-examination whether he did not state to him that the boy was over eighteen and may also produce other witnesses as to such declarations by the father. People v. Werner, (1903) 174 N. Y. 132, 66 N. E. 667.

Evidence of other offenses.— On a prosecution for a sale of liquors to a minor under the age of eighteen years, it is improper to introduce evidence showing a sale to the same person on a day other than the one charged in the indictment. People v. Andrus, (1902) 74 App. Div. 542, 77 N. Y. S. 780.

Prejudicial declarations of accused.— On a trial of an indictment for a sale of liquor to a minor under eighteen, it is error to introduce evidence showing that the accused had stated that he had been complained of for selling liquor to minors and that he expected it would cost him about seventy-five dollars, and that he was going to keep right on selling it just the same. People v. Werner, (1903) 174 N. Y. 132, 66 N. E. 667.

Cited.— Matter of Farley, (1914) 213 N. Y. 15, 106 N. E. 756, Ann. Cas. 1916C 494, L. R. A. 1916D 816.

§ 30. Other illegal sales and selling; definitions of "hotel" and "guest;" exceptions; special certificates in cities. It shall not be lawful for any person who has not paid a tax as provided in section eight of this chapter and obtained and posted the liquor tax certificate as provided in this chapter to sell, offer or expose for sale, or give away liquors in any quantity less than five wine gallons at a time; nor, without having paid such tax and complied with the provisions of this chapter, to sell, offer or expose for sale or give away liquor in any quantity whatever, any part of which is to be drunk on the premises of such vendor, or in any outbuilding, booth, yard or garden appertaining thereto or connected therewith. It shall not be lawful for any person, whether

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having paid such tax or not, to sell, offer or expose for sale, or give away, any liquor:

A. On Sunday; or before six o'clock in the morning on Monday; or

B. On any other day between one o'clock and six o'clock in the morning in cities of the first and second class. On any other day between twelve o'clock midnight and six o'clock in the morning in cities of the third class and in villages of over five thousand inhabitants, and on any other day between eleven o'clock in the evening and six o'clock in the morning in all other places; or

C. On any day of a general or special election, or city election or town meeting, or village election, within one-quarter of a mile of any voting place, while the polls for such election or town meeting shall be open; unless said special election is held for a legislative office within the limits of a city, in which event the provisions of this section shall apply only to the territory within which the special election is being actually held and to a distance of two hundred and fifty feet in every direction from every boundary of said territory; or

D. Within two hundred yards of the grounds or premises upon which any state, county, town or other agricultural or horticultural fair is being held, unless such grounds or premises are within the limits of a city containing one hundred and fifty thousand inhabitants or more; or

E. To sell or expose for sale or have on the premises where liquor is sold, any liquor which is adulterated with any deleterious drug, substance or liquid which is poisonous or injurious to health; or to suffer or permit any gambling in the place designated by the liquor tax certificate as that in which the traffic in liquors is to be carried on or in any yard, booth, garden or any other place appertaining thereto or connected therewith, or to suffer, permit or have any opening or means of entrance or passageway for persons or things between the room or place where the traffic in liquors is carried on, and any other room or place where any person whosoever suffers or permits any gambling, or to suffer or permit such premises to become disorderly, or to suffer, permit or have any opening or means of entrance or passageway for persons or things between the room or place where the traffic in liquors is carried on, and any other room or place which any person whosoever suffers or permits to become dis-

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orderly, or to carry on or to permit to be carried on or to be interested in any traffic, business or occupation, the carrying on of which is in violation of law; or

F. To permit any girl or woman, not a member of his family, or any minor under the age of eighteen years, or to knowingly permit any person who has been convicted of a felony, to sell or serve any liquor upon the premises; or to permit any person described in section twenty-nine of this chapter as "persons to whom liquor shall not be sold or given away" to enter and remain in any barroom where liquors are sold; or

G. To have opened or unlocked any door or entrance from the street, alley, yard, hallway, room or adjoining premises to the room or rooms where any liquors are sold or kept for sale during the hours when the sale of liquors is forbidden, except when necessary for the egress or ingress of the person holding the liquor tax certificate authorizing the traffic in liquors at such place, or members of his family, or his servants, for purposes not forbidden by this chapter; or to admit to such room or rooms any other persons during hours when the sale of liquor is forbidden; or

H. To have during the hours when the sale of liquor is forbidden any screen or blinds, or any curtain or article or thing, except the liquor tax certificate, covering any part of any window of the bar or room where liquors are sold or kept for sale; or to have in, near to or back of any window or door any opaque or colored glass or article or thing that obstructs or in any way prevents a person passing from having a full view from the sidewalk, alley, or road in front of, or from the side, or end of the building, of the bar and room, or any part of such bar and room, where liquors are sold or kept for sale; or to traffic in liquors in any interior bar or room or place not having in the principal door of entrance to such room or bar, a section of such door fitted with clear glass, through which, during prohibited hours and times, a clear, unobstructed view of the bar and room where liquors are sold and kept for sale can be had. And it shall be unlawful to have at any time in the room where liquors are sold any inclosed box or stall or any obstruction which prevents a full view of the entire room by every person present therein; or

I. For the holder of a liquor tax certificate under subdivision four of section eight to sell liquor except to passengers in actual transit; or

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J. To sell liquor in any quantity in a town in which a liquor tax certificate is prohibited as the result of a vote upon questions one, two and four submitted under section thirteen of this chapter; provided, however, that in a town in which a liquor tax certificate is prohibited as the result of a vote upon questions one, two and four submitted under said section thirteen, and traffic in liquors is permitted as the result of a vote upon question three submitted under said section, traffic in liquors may be carried on in such town as provided in subdivision three of section eight; and that a grower of fruit or a manufacturer of any liquor produced therefrom, in such town, may sell such liquor in quantities of two wine gallons or more, but only for delivery outside of such town, except that such liquors may be sold and delivered in such town to the holder of a liquor tax certificate under subdivision three of section eight of this chapter, as provided in subdivision seven of said section eight; or

K. To solicit, accept or procure in a town in which a liquor tax certificate is prohibited under questions one, two, and four of section thirteen of this chapter, as the result of a vote on "questions submitted," an order to deliver or send to another, or for another, liquor in any quantity, where the person for whom such liquor is procured resides in any such town.

L. It shall not be lawful for the keeper of a hotel, boarding or lodging-house who also traffics in liquor thereat, or who sells or gives away liquor, to rent more than once a bedroom or other similar room between the hours of nine o'clock in the evening and six o'clock in the morning, or to allow any such room to be occupied by more than one party of one or more persons during that period, or to rent such room or rooms for the purpose of prostitution or to a woman known or reputed to be a prostitute. A register shall be kept containing the name and home address of each person occupying such room and the time of day or night when rented, which register shall be signed by the guest in the presence of the hotel keeper, room clerk, or other employee having charge of such register at the hotel office or other similar public room, and not elsewhere. No such room shall knowingly be rented or assigned to a person signing a fictitious name or writing a fictitious home address on such register. Such register shall at all times be subject to the inspection of a special agent or any peace officer of the city, borough, village or town in which the hotel, boarding or lodging-house in which it is kept is situated.

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M. The provisions of clauses A, B, C and D of this section are subject, however, to the following exceptions: The holder of a liquor tax certificate under subdivisions two or three of section eight of this chapter who is a legally licensed pharmacist may sell liquor for medicinial purposes, only upon the prescription of a duly licensed physician, which prescription shall be preserved by the vendor and pasted in a book and be but once filled, and that only on the day when dated and given, which book shall be kept in the same room where the traffic in liquors is carried on, and shall be open to the inspection of any special agent or peace officer, and such liquors so sold shall not be drunk on the premises where sold, or in any outbuilding, yard, booth or garden appertaining thereto or connected therewith, except when such physician prescribes it to be used upon such premises in case of an accident, and provided further that the physician giving such prescription, shall not be the pharmacist himself or a member of the corporation, association or copartnership selling such liquor, nor in his or their employ, and such prescription shall not be given unless the physician is satisfied that the liquor to be furnished is necessary for the health of the person for whom it is prescribed, which fact must be stated in the prescription. Clauses A, C and D of this section are subject to the following exceptions:

N. The holder of a liquor tax certificate under subdivision one of section eight of this chapter who is the keeper of a hotel, may sell liquor to the guests of such hotel, but not in the barroom or other similar room of such hotel, except to such persons as are described in clauses one, two, three, four, five and six of section twenty-nine of this chapter, with their meals, or in their rooms therein, except that such traffic shall not be conducted in cities of the first and second class between the hours of one o'clock and six o'clock in the morning, nor in cities of the third classe and in villages of over five thousand inhabitants between the hours of twelve o'clock midnight and six o'clock in the morning, nor in any other place between the hours of eleven o'clock in the evening and six o'clock in the morning; and the term "hotel" as used in this chapter shall mean a building regularly used and kept open as such for the feeding and lodging of guests, where all who conduct themselves properly and who are able and ready to pay for their entertainment, are received if there be accommodations for

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them, and who, without any stipulated engagement as to the duration of their stay, or as to the rate of compensation, are, while there, supplied, at a reasonable charge, with their meals, lodgings, refreshment and such service and attention as are necessarily incident to the use of the place as a temporary home, and in which the only other dwellers shall be the family and servants of the hotel keeper; and which shall conform to the following requirements, if situate in a city, incorporated village of twelve hundred or more inhabitants, or within two miles of the corporate limits of either:

1. The laws, ordinances, rules and regulations relating to hotels and hotel keepers, including all laws, ordinances, rules and regulations of the state or locality pertaining to the building, fire and health department in relation to hotels and hotel keepers, shall be fully complied with.

2. Such buildings shall contain at least ten bedrooms above the basement, exclusive of those occupied by the family and servants, each room properly furnished to accommodate lodgers, and separated by partitions at least three inches thick, extending from floor to ceiling, with independent access to each room by a door opening into a hallway, each room having a window or windows with not less than eight square feet of surface opening upon a street or open court, light-shaft or open air, and each having at least eighty square feet of floor area, and at least six hundred cubic feet of space therein; a dining room with at least three hundred square feet of floor area, which shall not be a part of the barroom, with tables, and having suitable table furniture and accommodations for at least twenty guests therein at one and the same time, and a kitchen and conveniences for cooking therein sufficient to provide bona fide meals at one and the same time for twenty guests. The same requirements shall apply to a hotel situated in any other place, except that the number of bedrooms for guests shall not be less than six, and the dining room shall have not less than one hundred and fifty square feet of floor area and the kitchen accommodations shall be sufficient for at least ten guests. A guest of a hotel, within the meaning of this exception to section thirty of this chapter, is:

3. A person who in good faith occupies a room in a hotel as a temporary home and pays the regular customary charges for such occupancy, but who does not occupy such room for the purpose of having liquor served therein; or

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4. A person who, during the hours when meals are regularly served therein, resorts to the hotel for the purpose of obtaining and actually orders and obtains at such time, in good faith, a meal therein.

And it is further provided that a corporation or association, organized in good faith under chapter five hundred and fifty-nine of the laws of eighteen hundred and ninety-five, or under any law which prior to May sixth, eighteen hundred and ninety-five, provided for the organization of societies or clubs for social, recreative or similar purposes, and which corporation or association was actually lawfully organized, and, if a corporation, its certificate of incorporation duly filed, prior to March twenty-third, eighteen hundred and ninety-six, and which at such date trafficked in or distributed liquors among the members thereof, is excepted from the provisions of clauses A, B, C and D of this section. And the provisions of clause B of this section are subject to the following exception: In cities on the presentation by the holder of a liquor tax certificate under subdivision one of section eight of a permit for trafficking in liquor during the designated hours of one or more specified days, except Sunday, and at a place specified, granted and signed by the mayor of the city, and the payment of a tax, to be distributed as are taxes under subdivision four of section eight of this chapter, of ten dollars for each single day, or at the rate of twenty-five dollars for the period from one o'clock in the morning on Tuesday in cities of the first and second class, and from twelve o'clock midnight Monday in cities of the first class to and including not later than midnight on Saturday of each week, the state commissioner of excise shall issue a special certificate for the sale of liquor at the place during the time so specified, which certificate shall be in the form prescribed and furnished by the state commissioner of excise; provided that whenever such permit shall have been granted, signed by the mayor and filed with the state commissioner of excise, such permit shall continue in full force and effect until the expiration of such liquor tax certificate, or until the same shall be cancelled in a civil proceeding, or forfeited, or voluntarily surrendered for cancellation and rebate, unless such permit shall be revoked by a written instrument signed by the mayor of such city, and filed with the state commissioner of excise.

This section was derived from the Liquor Tax Law of 1896, § 31, as amended by L. 1897, ch. 312, § 22; L. 1900, ch. 367, § 10; L. 1901, ch. 640,

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§ 6; L. 1903, ch. 486, § 13; L. 1904, ch. 205, § 1, and L. 1908, ch. 350, §§ 10, 11, 12. It was amended to read as above by L. 1910, ch. 485, § 6; L. 1910, ch. 494, § 4, and L. 1912, ch. 264.

The section-heading was amended by L. 1910, ch. 494, § 4, by omitting the words "liquor tax" following the word "special," and by omitting the words "of the first and second class" following the word "cities."

Subdivision A was amended by L. 1910, ch. 494, § 4, by changing the word "five" to "six."

Subdivision B was amended by L. 1910, ch. 494, § 4, by substituting "six" for "five," in the first line, and by adding the remainder of the subdivision beginning with the words "in cities in the first and second class."

Subdivision F was amended by L. 1912, ch. 264, by adding the words "not a member of his family" following the word "woman" in the first line, and by omitting the words "not a member of his family" which formerly followed the words "age of eighteen years."

Subdivision H was amended by L. 1910, ch. 494, § 4, by adding the words "except the liquor tax certificate" which follow the words "article or thing," and by adding the words "of the bar or room where liquors are sold or kept for sale" which follow the words "any window," in the first part of the subdivision.

Subdivision J was amended by L. 1910, ch. 485, § 6, and L. 1910, ch. 494, § 4, both amendments being identical. These amendments struck out the words "except in accordance with the result of a vote upon question three submitted under said section," which formerly followed the words "section thirteen of this chapter" in the first part of the subdivision; and added the words "in a town in which a liquor tax certificate . . . and that" which follow the words "and that" next after the second semicolon.

Subdivision L was added by L. 1910, ch. 494, § 4.

Subdivision M is the same as the first paragraph formerly following subdivision K, the distinguishing letter "M" being added by L. 1910, ch. 494, § 4.

Subdivision N is the same as the second paragraph formerly following subdivision K. It was given its distinguishing letter "N" by L. 1910, ch. 494, § 4, which also made the following amendments: words "but not in the barroom or other similar room of such hotel" which follow next after the words "guests of such hotel" in the first part of the subdivision, added; words "that such traffic shall not be conducted in cities of the first and second class" following next after the words "or in their rooms therein, except," in the first part of the subdivision, added. The prohibited hours following the last noted amendment were changed from "one o'clock to five o'clock in the morning" and the last named hour made to read "six"; the words "nor in cities of the third class . . . and six o'clock in the morning" preceding the first semicolon were added in place of the former words "but not in the barroom or other similar room of such hotel," which were omitted. Paragraphs formerly 1 and 2 following the sentence "a guest of a hotel, within the meaning of this exception to section thirty of this chapter, is:" were numbered 3 and 4, and the last paragraph in the section was given the distinguishing letter "O." The former paragraph was also amended to read as above, the amendment being to that part of the paragraph following the words "signed by the mayor of the city" which formerly read as follows: "and the chief of police, and the payment of a tax of ten dollars for each day, the county treasurer or special deputy commissioner charged with the duty of issuing liquor tax certificates shall issue a special liquor tax certificate for the sale of liquor at the place and during the time so specified, which certificate shall be in the form prescribed and furnished by the state commissioner of excise."

Section 30 of the Liquor Tax Law of 1896 is now covered by section 29.

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I. Generally

Validity of sale of liquors where seller knows same will be illegally resold: see 3 Ann. Cas. 154 note; 15 Ann. Cas. 269.

Legal meaning of "require" in statute relating to prevention of fraud in sale of wine: see Ann. Cas. 1912A 1237 note.

Provision in act against giving away of intoxicating liquor where title only prohibits or regulates its sale: see 15 L. R. A. (N. S.) 430 note.

Discrimination as between different localities in respect to the right to sell intoxicating liquor: see 8 L. R. A. (N. S.) 362 note.

Regulation of admission of minors to saloons: see 22 L. R. A. (N. S.) 1007 note.

Validity of statute prohibiting drinking of intoxicating liquor or being intoxicated on passenger conveyance: see Ann. Cas. 1913B 1061 note.

General rules relative to liquor violations.—"The general rules of evidence applicable to trials in criminal cases, govern in the investigation of criminal charges for a violation of the Liquor Tax Law. The burden of proof is upon the prosecution; the defendant is presumed to be innocent until proved guilty beyond a reasonable doubt and no inference of guilt can be founded upon circumstances except such as naturally or necessarily follow from the facts. If the facts and circumstances are of such a character as to fairly permit an inference consistent with innocence, they cannot be regarded as evidence to support a conviction. The general rule in criminal cases is that where the evidence is circumstantial the facts shown must not only be consistent with, and point to, the guilt of the defendant, but must be inconsistent with his innocence. People v. Owens, (1896) 148 N. Y. 648, 43 N. E. 71.

Relation to section 33.—Where it is sought to sustain a seizure of liquors on the ground that this section has been violated, the section must be construed in connection with section 33, infra. Green v. Certain Liquors, (1916) 173 App. Div. 686, 160 N. Y. S. 126.

Liability of purchaser.—"It has long been recognized that one who buys liquor contrary to the Liquor Tax Law commits no crime and is not an accomplice." People v. Maynard, (1912) 151 App. Div. 790, 137 N. Y. S. 19.

Sale to minor under eighteen.—In a proceeding to cancel a certificate on the ground that the holder permitted a minor under the age of eighteen years to serve liquors on the premises, the fact that the holder did not knowingly, purposely or with knowledge violate the law, is no defense. Matter of Clement, (1909) 64 Misc. 439, 119 N. Y. S. 347.

Gift of food.—Under the Liquor Tax Law of 1896, as originally enacted, it was unlawful for a certificate holder to give away food to be eaten on the premises where liquor was sold. People v. City Prison, (1896) 6 App. Div. 520, 39 N. Y. S. 582, affirming 17 Misc. 1, 38 N. Y. S. 837.

Gift of liquors.—"A gift of liquors is not unlawful unless made with the intent to conceal an unlawful traffic." Green v. Certain Liquors, (1916) 173 App. Div. 686, 160 N. Y. S. 126.

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Illegality of woman's contract to serve liquors.—A contract by a woman, not a member of the family of the certificate holder, whereby she agrees to serve persons with liquors, is illegal; and she cannot recover damages for a breach thereof. In such a case the defendant may raise the question of the illegality of the contract under a general denial. Wilking v. Richter, (1899) 25 Misc. 735, 55 N. Y. S. 582.

Indictment.—An indictment for selling liquor without having paid the tax and procured the certificate, is not insufficient because the allegation is of a sale without a license instead of a sale without having paid the tax and procured the certificate, though such an allegation is not in conformity to the best pleading. People v. Seeley, (1905) 105 App. Div. 149, 93 N. Y. S. 982, affirmed (1905) 183 N. Y. 544, 76 N. E. 1102. Under an indictment charging a defendant with a sale of liquors without a certificate, he cannot be convicted of selling liquors to be drunk on the premises where sold, he having a license to sell liquors not to be drunk on the premises. Huffstater v. People, (1875) 5 Hun 23. See also, People v. Buffum, (1882) 27 Hun 216. And under an indictment charging a sale of liquor without a license, when it is shown that the defendant had a tavern keeper's license, he cannot be convicted of the crime of selling liquor on Sunday or of the crime of selling liquor to be drunk on the premises. People v. Brown, (1865) 6 Park. Crim. 666.

Proof of sale.—The calling for liquor and the drinking of the same upon the premises is *prima facie* evidence of a sale. Excise Com. v. Merchant, (1884) 34 Hun 19, affirmed (1886) 103 N. Y. 143.

Punishment for violation.—Violation of this section by an unauthorized sale is punishable as provided in subdivision 2 of section 36, infra. People v. Rolandelli, (1916) 160 N. Y. S. 766.

II. Sale without Certificate

Must indictment or information for sale of intoxicating liquors without license state name of purchaser: see 23 L. R. A. (N. S.) 582 note.

Burden of proof as to license or permit in prosecution for sale of intoxicating liquor without a license: see 36 L. R. A. (N. S.) 98 note.

Character of offense.—"The offense of selling liquor without a license by an innkeeper is not malum in se. It was not an indictable offense at common law for an inkeeper to supply his guests with drinks for a price. An offense malum in se, is one which is naturally evil as adjudged by the sense of civilized communities, such as murder, arson, theft and the like." Lewin v. Johnson, (1884) 32 Hun 408. And see People v. Corey, (1909) 133 App. Div. 456, 118 N. Y. S. 23, to the effect that the offense is malum prohibitum.

Intent.—Where a sale is made by one not having a liquor tax certificate entitling him to make the sale, his intent is immaterial, for the offense is malum prohibitum. People v. Corey, (1909) 133 App. Div. 456, 118 N. Y. S. 23, holding that it is no defense, where the defendant's hotel was destroyed by fire, that he had been advised that he was thereafter entitled to traffic in another building on the hotel premises.

Burden of proof.—In a prosecution for a sale of liquor without a certificate, the defendant is bound to show his license as a matter of defense, the sale having been proved. Matter of Lyman, (1897) 1 Liq. Tax Law Rep. 248.

Failure of county treasurer to issue certificate.—If a county treasurer fails to issue a certificate to which an applicant is entitled, the remedy of the applicant is a writ of certiorari under section 27; if he traffics in liquors without the certificate he violates the law. Clement v. Smith, (1908) 60 Misc. 595, 112 N. Y. S. 955.

Sunday sale without certificate.—On the trial of an indictment alleging a sale of liquor without a license on a certain Saturday, the prosecution may prove its case by evidence of a sale on the following Sunday; the variance in

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time is not material, and the fact that there is particular subdivision of the statute devoted to Sunday sales does not render the indictment defective. People v. Krank, (1888) 110 N. Y. 488, 18 N. E. 242, reversing 46 Hun 632.

Certificate not authorizing sale on premises.—A certificate authorizing a sale of liquors not to be drunk on the premises does not authorize a sale on a piazza which is a part of the building, though such piazza is on lands of the state. Matter of Lyman, (1898) 25 Misc. 638, 56 N. Y. S. 359.

Service of drinks in room other than barroom.—A wrongful sale of liquors without a license is not shown by evidence that drinks were served in rooms above a licensed barroom, where it affirmatively appears that the liquor was supplied from the bar through the medium of waiters in the employ of the proprietor, and that such rooms were connected with and incidental to the licensed premises. People v. Fappiano, (1912) 77 Misc. 613, 138 N. Y. S. 667. But where a certificate holder has a license to sell in one building, a sale in another building is a violation of the law. Matter of Cullinan, (1902) 2 Liq. Tax Law Rep. 611.

Ball grounds.—Where a liquor tax certificate designates a particular place on a ball ground, the delivery of beer to persons on the ground, at places other than the precise location designated in the certificate, is not a violation of the statute. "The business of trafficking in liquors, authorized by the certificate in a park or upon public grounds where people congregate on special occasions, comprehends something more than the right to sell over a bar at a designated point to such persons as go to the bar to be served. It fairly includes the right of the holder to distribute liquors in the glass by waiters to the patrons of the public place where the bar is located. . . . The license covers not only the right to sell over a bar, but whatever else is fairly included in or incidental to the business authorized." Matter of Lyman, (1899) 160 N. Y. 96, 54 N. E. 577, affirming 40 App. Div. 46, 57 N. Y. S. 634.

Seller taking money and procuring liquor from another.—The proprietor of a restaurant may be convicted of a wrongful sale of liquor without certificate, where one of his waiters takes an order for liquor from one of the patrons and goes outside and purchases the same for service to the guest, though such waiter advances his own money for the liquors and reimburses himself out of the money received from the patron. People v. Korn, (1905) 103 App. Div. 596, 92 N. Y. S. 1138, affirmed without opinion (1905) 181 N. Y. 570, 74 N. E. 1122, as explained in Matter of Cullinan, (1906) 114 App. Div. 509, 99 N. Y. S. 1119. And where the manager of a billiard parlor, after surrendering a certificate for traffic at the premises, advances money to his waiters to purchase liquor from a licensed bar in the same building to fill the order of a patron of his billiard parlor, and makes the charge therefor directly to his patron without informing him that he is not authorized to sell liquor, he is guilty of a violation of this section. Matter of Cullinan, (1906) 114 App. Div. 509, 99 N. Y. S. 1119.

Liquors purchased at another place.—Where liquors are purchased at another place, the owner of the premises where they are drunk does not incur any criminal liability by failing to object to the drinking. People v. Hagan, (1901) 2 Liq. Tax Law Rep. 527.

Instructions.— On the trial of an indictment for the sale of liquor without a certificate, where the defendant has admitted a prior conviction for a violation of the Liquor Tax Law it is improper for the court to charge that the jury may consider such conviction in determining whether having violated the law once he would keep on violating it. People v. Myers, (1906) 115 App. Div. 864, 101 N. Y. S. 291. The jury may be charged that the question for their determination is not whether the liquors sold are intoxicating, but whether the defendant trafficked in distilled or rectified spirits, wine, or fermented or malt liquors. People v. Cox, (1905) 106 App. Div. 299, 94 N. Y. S. 526. As to what liquors are within the purview of the Liquor Tax Law,

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see supra, § 2. In a prosecution under this section for a sale of liquor without a license, if the defendant has conceded that he had no license, it is not proper for the court to call the attention of the jury to the vote of the town against the sale of liquor, and it is error for the trial judge to state that it was for the jury to say whether a certain witness for the defendant was a "vicious and precocious off-scouring of the street." People v. Myers, (1906) 115 App. Div. 864, 101 N. Y. S. 291.

III. Prohibited Hours or Days

Validity or ordinance excluding persons from saloon during hours of closing: see 4 L. R. A. (N. S.) 109 note. *Opening saloon during prohibited hours for purposes other than sale of liquor:* see 36 L. R. A. (N. S.) 167 note.

Penal provisions relating to Sunday: see Penal Law, § 2140 et seq. *Special penalty for violation of Sunday closing act:* see 15 L. R. A. (N. S.) 646 note. *Delivery on Sunday of liquor bought previously as violation of Sunday Liquor Law:* see Ann. Cas. 1914A 639 note. *Criminal liability for sale on Sunday by partner, servant, or agent:* see 41 L. R. A. 670 note.

Lager beer.—The courts take judicial notice of the fact that lager beer is a fermented and malt liquor covered by the provisions of the Liquor Tax Law, and a sale thereof on Sunday constitutes a violation of the statute. People v. O'Reilly, (1908) 129 App. Div. 522, 114 N. Y. S. 258, affirmed (1909) 194 N. Y. 592, 88 N. E. 1128. And see supra, § 2 note.

Municipal ordinance requiring early closing.—The provisions of the Liquor Tax Law fixing the hours when the sale of liquor shall not be permitted, operates as a repeal of municipal ordinances making a more stringent regulation. People v. Weir, (1896) 1 Liq. Tax Law Rep. 101.

Offense by purchaser.—The statute does not make it an offense for a special agent to purchase liquor at a prohibited hour, where it is done for the purpose of procuring evidence. Lyman v. Oussani, (1900) 33 Misc. 409, 68 N. Y. S. 450, reversed on other grounds 65 App. Div. 27, 72 N. Y. S. 498.

Sufficiency of evidence.— Evidence showing that police officers entered saloon premises on Sunday and ordered and received whiskey from the defendant and drank the same, is sufficient to show that the defendant offered and exposed liquors for sale, though the officers did not pay for what they drank. People v. Clark, (1901) 61 App. Div. 500, 70 N. Y. S. 594.

A judgment of conviction for a sale of liquor on Sunday will be reversed, where the only evidence of a sale is that of a policeman who testified that he went to the defendant's place of business on Sunday, and, finding the door locked, entered a window, going into the barroom where he saw the defendant in his shirt sleeves with a bartender's apron on, and three other men in the room in front of the bar, with two glasses on the bar containing a small quantity of liquid, the nature of which he was unable to state, and he saw nothing delivered to anyone and saw no one drinking and saw the defendant do nothing but stand behind the bar. People v. Owens, (1896) 148 N. Y. 648, 43 N. E. 71.

Evidence considered in an action on a bond for a wrongful sale of liquor on Sunday, and held sufficient to establish a violation of the law. Clement v. Beers, (1908) 126 App. Div. 1, 110 N. Y. S. 99.

Election day.—The provisions of section C of this section relative to sales of liquor on election day, do not apply to school districts elections. Op. Atty.-Gen., (1911) 364.

Primary election day.—A primary election is not a "special election" within subdivision C. Op. Atty.-Gen., (1916) reported in 7 St. Dept. Rep. 492. And see, in this connection, 16 Ann. Cas. 252 note.

Sunday sale.—An indictment for a sale of liquor on Sunday need not state whether the defendant had a liquor tax certificate. People v. Parisi, (1911)

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147 App. Div. 466, 131 N. Y. S. 882. Nor is it necessary that such an indictment state the particular time of day that the unlawful sale was made. People v. McDonnell, (1908) 108 N. Y. S. 749. But an indictment for a sale of liquor on Sunday, May 18, 1884, is not sustained by proof of a sale on Sunday, April 20 1884. People v. Lavin, (1886) 4 N. Y. Crim. 547.

IV. Exceptions in Favor of Hotels

Hotel regulations generally: see General Business Law, § 200 et seq.

What constitutes hotel or tavern within liquor license law: see Ann. Cas. 1913B 1030 note; 20 L. R. A. (N. S.) 107 note. *Serving liquor with meals by proprietor of hotel or restaurant as sale:* see 25 L. R. A. (N. S.) 943 note. *Duty of innkeeper as to furnishing liquor to traveler on Sunday:* see 2 B. R. C. 687 note. *Statutes permitting sale of liquor on Sunday in hotels to "guests," "travelers," "with meals":* see 17 Ann. Cas. 817 note.

Generally.—"To justify a holder of a liquor tax certificate * * * in selling liquor on Sunday, it must appear that the person to whom the liquor was sold was one who, in good faith, occupied a room in the hotel, or a person who, during the hours, when meals are regularly served therein, resorts to the hotel for the purpose of obtaining and actually orders and obtains at such time, in a good faith, a meal therein. Matter of Clement, (1907) 117 App. Div. 5, 102 N. Y. S. 37.

Allegation of exception.—An indictment for a Sunday sale need not allege that the defendant was not a hotelkeeper and that the purchaser was not a guest, for the exceptions to the statute need not be negatived. People v. Haren, (1901) 35 Misc. 590, 72 N. Y. S. 205. And see, supra, § 35, as to indictments for offenses.

Burden of proof.— To justify a sale of liquors on Sunday by a hotel keeper, the burden of proof is upon the proprietor to show that the structure was a hotel and that the purchaser was a guest as defined in subdivision N of this section. Matter of Lyman, (1899) 28 Misc. 408, 59 N. Y. S. 968, affirmed 48 App. Div. 275, 62 N. Y. S. 846; Matter of Cullinan, (1904) 45 Misc. 497, 92 N. Y. S. 802. When it is established that liquor was sold on Sunday by a person holding a liquor tax certificate, the holder of the certificate must establish that the person furnished with liquor was a guest of the hotel. Matter of Clement, (1907) 117 App. Div. 5, 102 N. Y. S. 37.

In an action on a bond, proof of a sale of liquor by a hotel keeper on Sunday establishes a *prima facie* case under the general prohibition against selling liquor on Sunday, and the burden is then imposed on the defendant to establish that the certificate holder came within the exception of the rule as the keeper of a hotel making a sale to a guest. Cullinan v. O'Connor, (1905) 100 App. Div. 142, 91 N. Y. S. 628. And, in a proceeding for the revocation of a certificate on the ground that the holder sold liquor on Sunday, if the defendant relies upon the exception in this section in favor of hotelkeepers, bona fide clubs, etc., he must plead and prove the facts bringing him within the exception. Matter of Schuyler, (1901) 63 App. Div. 206, 71 N. Y. S. 437. And, even in a criminal prosecution for a sale on Sunday, the People are not required to prove the case to be without the exceptions; after evidence has been produced showing a sale on Sunday the burden is on the defendant to establish the exception. People v. Clark, (1901) 61 App. Div. 500, 70 N. Y. S. 594.

What constitutes a hotel.—The definition of a hotel, as contained in this section, applies to the term when used in other sections of the Liquor Tax Law. Farley v. Dittmann, (1913) 155 App. Div. 363, 140 N. Y. S. 321, affirmed without opinion (1914) 213 N. Y. 659, 107 N. E. 1077; People v. Hegeman, (1912) 75 Misc. 163, 135 N. Y. S. 90. For a structure to be classed as a hotel, it is not necessary that it have a safe, a register or a

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stable. Matter of Brewster, (1903) 39 Misc. 689, 80 N. Y. S. 666, reversed on other grounds 85 App. Div. 235, 83 N. Y. S. 564. But the mere fact that a building has twenty-five rooms is not sufficient proof that it is hotel. Matter of Cullinan, (1904) 45 Misc. 497, 92 N. Y. S. 802. A place which is used merely as a boarding house, is not a hotel. Matter of Harper, (1900) 30 Misc. 663, 64 N. Y. S. 524. But if a structure contains the requisite number of rooms and the owner thereof receives and cares for every traveler or transient guest that applies for accomodations, it may be a hotel though the owner calls it a boarding house and though the guests actually accommodated are few. Matter of Brewster, (1903) 85 App. Div. 235, 83 N. Y. S. 564, reversing 39 Misc. 689, 80 N. Y. S. 666.

Hotel defined by building code.— On a question whether an applicant is entitled to a liquor tax certificate for traffic in a hotel, whether the building is a hotel is to be determined by the definition in this section, not by the definition of a hotel as prescribed in the building code of the city where the building is located. Matter of Clement, (1908) 129 App. Div. 229, 113 N. Y. S. 392, affirmed (1909) 195 N. Y. 530 mem.

Alteration in hotel after issuance of certificate.— Where premises are sufficient as a hotel when a certificate therefor was issued, but thereafter the proprietor makes alterations which bring it below the test prescribed by this section, the holder will lose the privilege of selling liquors on Sunday, but his certificate will not be revoked merely because he made the alterations. Matter of Lyman, (1900) 2 Liq. Tax Law Rep. 260.

Destruction of hotel by fire.—Where the voters of a town have voted against the sale of liquors in such town except under proposition No. 4, and thus a hotel keeper can sell only in connection with the keeping of the hotel, and thereafter the hotel is destroyed by fire, the right to sell liquors is lost, and a conviction may be had for a sale in an adjoining building. People v. Corey, (1909) 133 App. Div. 456, 118 N. Y. S. 23.

Statements of special agent as to sufficiency of hotel.— In an action on a bond based on a sale of liquor on Sunday, the structure being insufficient to constitute a hotel within the meaning of subdivision N of this section, the fact that a special agent told the proprietor that the building complied with the statute, affords the defendant no defense. Cullinan v. O'Connor, (1905) 100 App. Div. 142, 91 N. Y. S. 628, wherein it was said: "A hotelkeeper must be charged with knowledge of the statutory provisions which govern his business. In this particular case the violations consisted in physical deficiencies in the number, size and equipment of rooms in his hotel. These were matters of very palpable observation, quite as plain to him as to any one else, and it seems to us that it would be quite a dangerous and radical application of the law of principal and agent if he and his surety could be allowed to excuse themselves to the people for plain shortcomings by virtue of an assurance of an excise agent that those conditions were right and lawful which anybody could see were not."

Sufficiency of bedrooms.—A bedroom opening into the back yard, but with no door opening into the hall, is not a bedroom in compliance with this section. Matter of Locklin, (1899) 2 Liq. Tax Law Rep. 57. A certificate issued for traffic in connection with a hotel, will be revoked where the bedrooms are not of the size required by this section. Matter of Ryon, (1903) 39 Misc. 698, 80 N. Y. S. 1114, affirmed 85 App. Div. 621, 83 N. Y. S. 123. And see Matter of Place, (1898) 27 App. Div. 561, 50 N. Y. S. 640, affirmed without opinion (1898) 156 N. Y. 691, 50 N. E. 1121, wherein the structure and equipment of certain alleged bedrooms were considered and held insufficient.

Where the statute required a "hotel" to have six bedrooms with an independent access by door from the hall, exclusive of those occupied by the family and servants, it was held that where the family vacated one of the bedrooms after making the application for the certificate and lodged in the hall, in order to leave six bedrooms for guests, five of the bedrooms opening

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into such hall, the hotel was not sufficient, as such use of the hall made it practically a bedroom. Matter of McMonagle, (1903) 41 Misc. 407, 84 N. Y. S. 1068.

Who are guests.—The definition of a guest, as contained in subdivision N-4, involves the element of good faith; and on a prosecution for a sale of liquors on Sunday where one of the material issues is whether the purchaser is a guest of the hotel where the liquors were sold, the court will not err in submitting to jury the good faith of the person making the purchase. People v. Dippold, (1898) 30 App. Div. 62, 51 N. Y. S. 859.

"In order to be a guest through service of a meal and to confer upon the hotelkeeper the privilege of selling liquor upon Sunday, a person must resort to a place for the primary purpose of obtaining in good faith a meal. This purpose, when effectuated by the service upon the hotelkeeper of such meal, draws with it as an incidental and secondary matter the right to procure and serve liquor. It is also so well established as to be elementary in this connection that the primary purpose of going to a hotel must not be to obtain liquor, and that such purpose will not serve as a protection to the hotelkeeper for his Sunday sales, no matter how colored, disguised or concealed, provided only the courts can detect the real object and distinguish the misrepresentation of the devices which are employed in the attempt to cloak and cover it. Cullinan v. O'Connor, (1905) 100 App. Div. 142, 91 N. Y. S. 628.

Where testimony given by special agents shows that their essential purpose in a hotel on Sunday was the desire to procure liquor, that they did not desire any meal, that after the waiter had insisted in a perfunctory manner in serving with the liquor some trifling refreshments, the latter were carried away again undesired and untasted, and that this operation was repeated over and over, a verdict of the jury that such agents constituted guests is against the weight of evidence. Cullinan v. O'Connor, (1905) 100 App. Div. 142, 91 N. Y. S. 628. The fact that one desiring a drink of liquor signs a hotel register and takes a sandwich which he does not want, does not make him a guest. Matter of Farley, (1913) 158 App. Div. 851, 144 N. Y. S. 268. Clearly, the mere purchase of liquor does not make one a guest. People v. Brede, (1897) 1 Liq. Tax Law Rep. 174. And see Farley v. Buttner, (1914) 165 App. Div. 343, 150 N. Y. S. 914, where the evidence was held sufficient to show a sale of liquor on Sunday to one not a guest.

The words "other dwellers" as used in subdivision N of this section do not cover guests who stay at a hotel for a definite period at a stipulated engagement, and hence a building may be a hotel within the meaning of this section though the proprietor accommodates some of the occupants at a stipulated weekly or monthly sum for their apartments. Cullinan v. Clark, (1905) 46 Misc. 188, 93 N. Y. S. 256, wherein it was said: "The mere presence of some guests, who have made a stipulated engagement as to the duration of their stay, or as to the rate of compensation they should pay, cannot operate to deprive that which is a hotel of its character as such. The test is what the landlord is willing to do and sometimes does in the way of receiving visitors without any agreement as to rate or time, and not what he may do in other cases and with other visitors in the way of making such engagements in advance. Were it otherwise a visitor could, by asking the price of rooms and selecting one at some specified rate and engaging it for one night or two nights or any other stated term, change the character of the oldest or largest or best established hostelry, and render, within the meaning of the statute, not a hotel that which in common acceptance and under ancient and well-established rules of law is a hotel."

What constitutes a meal.—"It has been authoritatively held under the Liquor Tax Law that a sandwich, or a bowl of soup, or a plate of beans or any quantity of food which at the time satisfies the appetite or desire of the person taking it constitutes a meal." People v. Friedman, (1913) 157 App.

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Div. 437, 142 N. Y. S. 367. But the eating of a pot pie on one occasion when a person took a drink of whiskey was held not to be a meal within the meaning of the Liquor Tax Law. Matter of Davis, (1902) 3 Liq. Tax Law Rep. 40.

Sandwich as a meal.—The service of a sandwich with intoxicating liquors may be sufficient to constitute a meal where that is all the nourishment the purchaser desires for a meal. Matter of Cullinan, (1904) 93 App. Div. 427, 87 N. Y. S. 660, wherein it was said: "There can be no reasonable doubt that under some circumstances a sandwich and a drink of whiskey or other beverage constitute a meal, under our modern Bohemian system of living; many men in clubs, at restaurants and elsewhere confine their eating at certain periods of day to a single dish — to a bowl of soup to a plate of beans, or a sandwich, and there is no particular kind or quantity of food which the law demands for a meal, so far as we have been able to discover, it all depending upon the person to be served and the condition of his appetite. . . . We apprehend, under the liberal construction to which a revenue measure is entitled, and considering the forfeiture which is worked by a violation of the provisions of the statute, that it is not the duty of the respondent to inquire diligently into the motives which actuate those who frequent his place. He has a right, in the absence of knowledge to the contrary, to assume that one who comes into his place and orders a sandwich or other article of food, does so because he desires the nourishment it affords, and if a single sandwich satisfies the desires of the person, it constitutes a meal, and the keeper of a hotel has the right to serve liquors to him with such meal." But where sandwiches are not desired by one purchasing liquor, but are served with the liquor merely for the purpose of evading the law and enabling the purchaser to get a drink of liquor, they do not constitute a meal. Matter of Clement, (1907) 117 App. Div. 5, 102 N. Y. S. 37; Matter of Schuyler, (1901) 63 App. Div. 206, 71 N. Y. S. 437; Matter of Cullinan, (1904) 45 Misc. 497, 92 N. Y. S. 802; Matter of Cullinan, (1903) 3 Liq. Tax Law Rep. 112. Where the purchaser desires a drink, not a sandwich, and the sandwich is furnished merely for the apparent satisfaction of the law, and is not ordered or eaten, and such situation is brought to the knowledge of the one serving the drink, the statute is violated. Matter of Cullinan, (1904) 93 App. Div. 427, 87 N. Y. S. 660. The placing of a plate of sandwiches upon a table where liquors are served, is not the service of a meal within this section, but is a mere subterfuge to violate the law. Farley v. Buttner, (1914) 165 App. Div. 343, 150 N. Y. S. 914. The service of a sandwich which is not ordered or wanted, is not the service of a meal and the person is not a guest. Matter of Kinzel, (1899) 28 Misc. 622, 59 N. Y. S. 682. Where sandwiches are not served in good faith as a meal, and are not ordered and are not eaten, the use of the sandwiches is simply an attempt to evade the law. Matter of Schuyler, (1901) 2 Liq. Tax Law Rep. 504. Where the sandwiches are merely incidental to the liquor, the law is violated by a sale on Sunday. Matter of Cullinan, (1903) 41 Misc. 3, 83 N. Y. S. 581, affirmed 93 App. Div. 427, 87 N. Y. S. 660. "To put a sandwich beside a drink when a sandwich is not ordered, and to take it away again without having received pay therefor, is not serving in good faith a meal with a drink." Matter of Lyman, (1899) 28 Misc. 408, 59 N. Y. S. 968, affirmed 48 App. Div. 275, 62 N. Y. S. 846. Where special agents ordered whiskey at a hotel on Sunday and were told by the waiter that they could not have such drink unless they bought something to eat, in response to which they said they did not want to eat but if it were necessary to buy something to get a drink of liquor they would do so, and that then sandwiches were brought and paid for but not eaten, a violation of the statute was established. Farley v. Bronx Bath, etc., Co., (1914) 163 App. Div. 459, 148 N. Y. S. 579.

V. Social Clubs

Excise law of 1892.— Under chapter 401 of the laws of 1892, it was not an offense for a bona fide social club to furnish liquors to its members, upon their

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written orders, at a price designed to cover only the purchase price and the cost of service, the furnishing of liquors being merely incidental to the legitimate purpose for which the club was organized. People v. Adelphi Club, (1896) 149 N. Y. 5, 43 N. E. 410, 52 A. S. R. 700, 31 L. R. A. 510. And the same doctrine was announced under the Liquor Tax Law of 1896 as originally enacted. People v. Hamilton, (1896) 17 Misc. 11, 39 N. Y. S. 531.

Burden of proof.—To justify the distribution of liquors during prohibited hours on the ground that the distribution was made by a social club, the burden is upon it of showing that it is a bona fide social club. Matter of Lyman, (1898) 28 App. Div. 127, 50 N. Y. S. 977. In a proceeding under section 27 to revoke a certificate issued to a social club on account of a sale of liquors on Sunday, the burden is upon the club to show that it is a social club within the meaning of this section. Matter of Lyman, (1897) 1 Liq. Tax Law Rep. 248; Matter of Lyman, (1897) 1 Liq. Tax Law Rep. 261.

Sale to others than members.—Though an organization was originally incorporated as a social club, it loses the privilege of selling liquors on Sunday or other prohibited hours, where it becomes merely a common seller of liquor to any person who is willing to purchase. Matter of Lyman, (1898) 28 App. Div. 127, 50 N. Y. S. 977.

Not bona fide club.—A certificate issued to an alleged club will be revoked, where it appears that the club was only a fraudulent scheme concocted to evade the law and permit the sale of liquor at prohibited hours. Matter of Lyman, (1898) 28 App. Div. 209, 50 N. Y. S. 898. Whatever may be the alleged purpose of an organization, the court is at liberty to examine into all the facts and conclude whether the particular organization is within the provisions of the law. Matter of Lyman, (1898) 28 App. Div. 127, 50 N. Y. S. 977. The exception in favor of clubs applies in favor of those clubs which are organized for social, recreative or similar purposes, as to which the supplying of meals and liquors is incidental merely; and the statute does not apply to an organization, the sole object of which is to supply liquors to its members for the purpose of evading the provisions of the Liquor Tax Law. Matter of Lyman, (1898) 28 App. Div. 127, 50 N. Y. S. 977.

VI. Gambling and Disorderly Premises

Special agents as gamblers.—A special agent who operates a slot machine in a saloon for the purpose of procuring evidence is not a gambler, and it is reversible error for a court to so charge. Clement v. Belanger, (1907) 120 App. Div. 662, 105 N. Y. S. 537.

Slot machine.—The maintenance of a nickel slot machine is gambling, and is forbidden in premises where liquors are sold. Lyman v. Kurtz, (1901) 166 N. Y. 274, 59 N. E. 903; Lyman v. Brucker, (1899) 26 Misc. 594, 56 N. Y. S. 767. And see, supra, section 21, subdivision 7, as to prohibitions against gambling.

The maintenance of a slot machine which returns to every person depositing five cents therein a check good for five cents in trade and in some cases returns a check for a greater amount, may constitute a violation of this section. Matter of Cullinan, (1906) 114 App. Div. 654, 99 N. Y. S. 1097. Compare Cullinan v. Hosmer, (1905) 100 App. Div. 148, 91 N. Y. S. 607.

Passageway to gambling rooms.— Subdivision E not only prohibits the suffering or permitting of an opening from the place where traffic in liquors is carried on to a room where gambling is permitted, but the having of an opening or passageway is prohibited. Matter of Farley, (1912) 151 App. Div. 291, 136 N. Y. S. 115.

Door opening into hall leading to gambling room.—The mere physical condition that gambling is carried on in the second story and a saloon is on the first floor of a building and there is a door opening from the barroom into the

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hallway near the door of the stairs which lead to the second floor, does not necessarily constitute a violation of this subdivision. Matter of Farley, (1911) 73 Misc. 551, 131 N. Y. S. 117. And see also Matter of Farley, (1911) 131 N. Y. S. 120.

Though the gambling premises are maintained by another person and are on an upper floor in the adjoining building, the certificate holder may violate subdivision E of this section by having a door which opens into the hallway leading to such second story, which entrance waiters use to carry drinks from the barroom to the gambling room. Matter of Farley, (1911) 73 Misc. 543, 131 N. Y. S. 113.

Communication between barroom and room used for disorderly purposes.— The fact that there is direct communication between the barroom and the hallway and staircase leading to rooms used for disorderly purposes, is sufficient to justify a revocation of the liquor tax certificate, though the disorderly premises are conducted by a party other than the certificate holder. Matter of Farley, (1914) 161 App. Div. 205, 146 N. Y. S. 473.

Sufficiency of evidence of disorderly premises.— Evidence that in a room adjoining the barroom connected with a door, tables were provided for drinking, and that when special agents on three different occasions entered the room, women approached them and joined with them in drinking, made vulgar and indecent exposures of their persons, and solicited them to go to a neighboring hotel for immoral purposes, the waiter joining with the party in immoral suggestions, is sufficient evidence to warrant a cancellation of the certificate. Matter of Clement, (1910) 141 App. Div. 139, 126 N. Y. S. 227.

VII. Entrance to Barroom at Prohibited Hours

Validity and construction of statute or ordinance regulating entrances to place of sale of intoxicating liquors: see Ann. Cas. 1916B 1021, note, 4 L. R. A. (N. S.) 109, note.

Validity of ordinance excluding persons from saloon during hours of closing: see 4 L. R. A. (N. S.) 109, note.

Two offenses in subdivision.—" This subdivision [Subdivision G] defines two distinct offenses. Briefly stated they are as follows: First, having open or unlocked any door from an adjoining room to a barroom except when necessary, etc.; second, admitting to a barroom persons other than members of the family or servants of the occupant during hours when the sale of liquor is forbidden." People v. Lupton, (1907) 52 Misc. 336, 103 N. Y. S. 172.

Burden and quantity of proof.— In a criminal prosecution for a violation of subdivision G in admitting persons to the barroom on Sundays, the burden is on the People to prove beyond a reasonable doubt that the persons admitted to the room were not employees of the certificate holder admitted in the course of their employment. People v. Ryan, (1903) 86 App. Div. 524, 83 N. Y. S. 657.

Negativing exceptions in indictment.—An indictment under subdivision G for keeping an entrance open into the barroom during prohibited hours is defective if it does not negative the exception relative to the necessity for the egress and ingress of the persons named. People v. Lupton, (1907) 52 Misc. 336, 103 N. Y. S. 172.

Admission of persons on Sunday.— In a prosecution of a certificate holder for admitting a person to his barroom on Sunday, contrary to the provisions of subdivision G, it is not necessary for the People to prove that the certificate holder personally escorted a customer into the barroom; if the place was open on Sunday and a customer came in and bought liquor, the defendant, in the legal, as well as in the ordinary, sense " admitted " him to the room. People v. Rand, (1906) 114 App. Div. 826, 100 N. Y. S. 174.

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Admission to adjoining room.— Under subdivision G of this section, the offense of admitting persons to "such room or rooms" as defined in the last clause of the subdivision, is not committed by admitting a person to a room adjoining the barroom, though the door between the two rooms is open. People v. Lupton, (1907) 52 Misc. 336, 103 N. Y. S. 172.

Bar in pavilion.— Where the entrance to a hotel at Coney Island was through a pavilion fitted with folding doors which were thrown open during business hours, so that from the walk the place presented the appearance of an inclosure fitted with tables, etc., after the manner of popular resorts, the front of the inclosure being wide open to the street, and in one corner of this pavilion was a bar which on Sundays was partitioned off from the pavilion by a wood and glass partition, so that while the bar was fully exposed, it was in fact cut off entirely from the pavilion, except for a doorway for the use of the servants of the proprietor, it was held that it was not a violation of subdivision G to have this pavilion open on Sundays for the accommodation of the patrons of the place. Matter of Cullinan, (1904) 93 App. Div. 427, 87 N. Y. S. 660.

Adjustable partition between saloon and restaurant.—Where an adjoining saloon and restaurant which have been conducted by different persons comes under the proprietorship of one, and such proprietor thereupon constructs upon the dividing line an adjustable partition, which he keeps closed on Sunday but open on week days, subdivision G is not violated. Matter of Cullinan, (1904) 90 App. Div. 607, 86 N. Y. S. 1046.

Violation not established.—A hotel proprietor's certificate will not be revoked on the ground that the door leading to the barroom of the hotel was left open on Sunday, where it appears that the door was necessarily open for the use of waiters, who were serving meals and drinks, and that when special agents intruded into the barroom they were promptly ejected, while other persons in the barroom were servants of the holder of the certificate. Matter of Cullinan, (1902) 75 App. Div. 301, 78 N. Y. S. 118.

Revocation of certificate.—Where the door leading into the barroom is open on Sunday, and such entrance is not necessary for the ingress and egress of the certificate holder and the members of his family or employees, the certificate will be revoked. Cullinan v. Ulmann, (1902) 3 Liq. Tax Law Rep. 57. And see supra, section 27, as to the revocation of a certificate for a violation of the law.

Sufficiency of evidence.— Evidence considered in an application for the revocation of a certificate on the ground that subdivision G was violated, and held not so clearly to establish a violation that an order dismissing the petition would be reversed. Matter of Cullinan, (1902) 68 App. Div. 119, 74 N. Y. S. 182.

VIII. Obstruction of View During Prohibited Hours

Municipal power as to screens in barrooms: see 24 L. R. A. 768, note.
Effect of temporary screening during prohibited hours: see 21 L. R. A. (N. S.) 136, note.

Wilfulness as an element of the offense.—The punishment for obstructing the view to the premises is prescribed by subdivision 5 of section 36, and that subdivision makes "wilfulness" an element of the crime. Hence an indictment for a violation of subdivision H of section 30 must allege that the act was done wilfully. People v. Wolcott, (1897) 1 Liq. Tax Law Rep. 119.

Act of employee.—A conviction under subdivision H for obstructing the view into a barroom on Sunday does not depend on criminal intent; and the certificate holder may be convicted of a violation of such subdivision on proof that the act was done by his employee without his knowledge and against his

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instructions. People v. D'Antonio, (1912) 150 App. Div. 109, 134 N. Y. S. 657, wherein it was said: "There is no doubt about the general rule that one cannot be convicted of a crime without proving a criminal intent, but this rule has its exceptions. Statutes which are in their nature police regulations, as the one here under consideration is, impose criminal penalties, irrespective of any intent and obviously for the purpose of requiring a degree of diligence for the protection of the public against violations. This statute forbids one holding a liquor tax certificate similar to the one held by the defendant to do, or permit to be done, certain prohibited acts and by fair intendment this includes acts done in the use of the premises in carrying on the business, whether done by the licensee in person or by his agent left by him in charge and management of the business during his absence."

Partial obstruction.— Prior to 1908, subdivision H was construed to the effect that a partial covering of a window, leaving a full and unobstructed view through other portions of the window and through other windows not covered, was not such a violation as required a revocation of the certificate. Matter of Plass, (1902) 71 App. Div. 488, 76 N. Y. S. 2, affirmed on opinion below (1903) 175 N. Y. 524, 67 N. E. 1089. But in 1908 a comma after "window" (now after the word "sale" in the fourth line of the statute) was changed to a semi-colon, and the change in punctuation was held to make a partial covering of a window by a curtain a violation of the law, though an unobstructed view through other parts of the window was left. Matter of Chapman, (1909) 64 Misc. 440, 119 N. Y. S. 352.

IX. Solicitation in "Dry" Town

Liability for acts of employees.— Personal guilt on the part of the offender is necessary to the maintenance of a prosecution under subdivision K of this section. The defendant must have committed the offense himself or must personally have authorized another to commit it. The case is not like that where a statute requires a particular thing to be done and declares the failure to do it a criminal offense. There an employer may sometimes be criminally chargeable with the consequences of an act on the part of his servants although he expressly imposed upon them the duty of obedience to the law. People v. Weiner, (1914) 211 N. Y. 469, 105 N. E. 658, Ann. Cas. 1915D 733, affirming 153 App. Div. 541, 138 N. Y. S. 320.

Purchase for use of purchaser.— It is not necessary for a violation of subdivision K of this section that the purchase was to be for the benefit of some person other than the actual purchaser. People v. Weiner, (1914) 211 N. Y. 469, 105 N. E. 658, Ann. Cas. 1915D 733, affirming 153 App. Div. 541, 138 N. Y. S. 320, wherein it was said: "While there are some grammatical objections to this construction, there are equally cogent objections of the same nature to the other; and it seems to me that it would be narrowing the meaning too much to exclude a case of soliciting custom from one who designs purchasing the liquor for his own use. The solicitation of any resident of a no-license town is forbidden, whether the liquor is to be consumed by him or by some other resident of such town after he gets it."

Solicitation through mails.— Subdivision K of this section does not render one criminally liable for sending advertising circulars through the mails to persons residing in a no-license town. People v. Weiner, (1914) 211 N. Y. 469, 105 N. E. 658, Ann. Cas. 1915D 733, affirming 153 App. Div. 541, 138 N. Y. S. 320, wherein it was said: "There is nothing in the language of the statute to indicate that the legislature intended such an extraordinary innovation in the criminal law as would arise from the creation of an offense which would render a person liable as a criminal in a town which he might never have visited, simply because he mailed a liquor price list from a distant point in another county to a possible purchaser. Such a construction,

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as is aptly suggested in one of the opinions of the Appellate Division, would make it a crime for any of the large grocery establishments in the city of New York to send its catalogues containing a price list of liquors for sale to their correspondents residing in no license towns."

Transaction out of town.— Subdivision K prohibits the soliciting, accepting or procuring of orders to deliver intoxicating liquors in a town in which a certificate is prohibited, but does not prohibit the selling of liquor to a person who resides in such town where the transaction is had outside of town. Merrihew v. Cuneo, (1911) 143 App. Div. 862, 128 N. Y. S. 755, affirmed without opinion (1912) 205 N. Y. 592, 98 N. E. 1108.

§ 30-a. Sales of liquor to United States cadets at or near West Point. It shall not be lawful for any person, whether having paid the tax imposed by this chapter or not, to sell, offer or expose for sale, or give away, any liquor within half a mile of the grounds of the United States military academy at West Point to any United States cadet in uniform, or to a person known to be a United States cadet, who is stationed at such academy.

New. Added by L. 1911, ch. 762.

§ 31. Lists of lodgers to be furnished by hotel, lodging and boarding house keepers. The holder of a liquor tax certificate under section eight of this chapter, who shall be the keeper of a hotel, lodging or boarding house shall, during the time such certificate is held, whenever and as often as the same shall be required, and within twenty-four hours from the service of a written notice therefor, deliver personally to the county treasurer or special deputy commissioner who issued the liquor tax certificate held by such hotel keeper, at his office, for immediate transmission to the state commissioner of excise, a verified report which shall contain a true and complete statement of the names of all persons entertained by him as guests, lodgers or boarders, stating after each name the date since when such guest, lodger or boarder has been permanently and continuously an inmate of said hotel, lodging or boarding house, which report shall cover the period specified by the state commissioner of excise in his notice therefor and all facts pertinent thereto required by said notice. Service of such notice upon any person in charge of the premises shall be sufficient. Every such certificate holder shall keep a daily record of all persons entertained at said hotel, lodging or boarding house as a guest, boarder or lodger, with the time of arrival and departure set opposite each name, which record shall at all

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times be subject to inspection by any special agent appointed under this chapter, who may enter upon said premises for that purpose at any time when the same are open. Any person who shall neglect or refuse to keep such record, or to allow inspection of the same or to make such report, as above provided, shall be guilty of a misdemeanor, and upon convection, shall be subject to the same penalties prescribed in subdivision one of section thirty-six of this chapter.

This section was derived from the Liquor Tax Law of 1896, § 31a, as added by L. 1901, ch. 640, § 7, and amended by L. 1903, ch. 486, § 14. It was amended by L. 1909, ch. 281, § 10. The amendment changed the section reference from thirty-five to thirty-six.

Section 31 of the Liquor Tax Law of 1896 is now covered by section 30.
Section 31a of the Liquor Tax Law of 1896 is now covered by section 31.
Section 31b of the Liquor Tax Law of 1896 is now covered by section 32.
Section 31c of the Liquor Tax Law of 1896 is now covered by section 33.
Affidavits by hotel keepers holding liquor licenses: see ELECTION LAW, § 481.

§ 32. In respect to applications to traffic in liquors as keeper of a hotel. The provisions of this section shall apply only to cities and to incorporated villages.

1. Before any liquor tax certificate shall be issued or transferred to any corporation, association, copartnership or person upon an application statement by which it appears that the business of keeping a hotel is to be carried on in connection with the traffic in liquors on the premises for which a liquor tax certificate under subdivision one of section eight of this chapter, shall be applied for, there shall be filed in the office of the special deputy commissioner of excise or county treasurer empowered to issue such certificate a sworn statement that such declared hotel building complies with the provisions of section thirty of this chapter relating to hotels and hotel keepers; such statements shall be filed by the following persons: in the city of New York by the superintendent of buildings of the borough in which such premises shall be situate, in other cities by the mayor of such city and in villages by the president of such village. The above named persons shall inspect or cause to be inspected all buildings within such borough, city or village, which are deemed to be hotels, either as defined by this chapter, or by any building laws or local ordinances, rules or regulations, or which are popularly known as hotels, and shall make a report in writing to the special deputy commissioner of excise or county

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treasurer having jurisdiction in such borough, city or village, verified by the affidavit of the person making the same, giving the location by street and number, and if there by no street and number such description as shall identify the premises, of all buildings that may hereafter be erected as or altered or converted into hotels, however defined, and which shall comply with the provisions of section thirty of this chapter relating to hotels and hotel keepers. Such reports shall be made within ten days after erection or alteration of such buildings is completed. The officials responsible for making the reports mentioned in this section shall in each case file among their records a detailed statement showing the following facts on which such report is based: the number of bedrooms such building contains above the basement exclusive of those occupied by the family and servants; whether each bedroom is properly furnished to accommodate lodgers, whether the bedrooms are separated by partitions at least three inches thick extending from floor to ceiling, whether there is independent access to each bedroom by a door opening into a hallway and whether each bedroom has a window or windows with not less than eight square feet of surface opening upon a street or open court, light-shaft or open air, and whether each bedroom has at least eighty square feet of floor area and at least six hundred cubic feet of space therein; whether such building contains a dinning-room which is not a part of the barroom and the area in square feet of such dinning-room, and whether it is provided with tables and has suitable table furniture and the number of guests for which it has accommodations at one and the same time; also whether such building contains a kitchen and conveniences for cooking therein sufficient to provide bona fide meals at one and the same time for ten or twenty guests as required by law. All reports and records mentioned in this subdivision and in subdivision two of this section shall be deemed public records and shall be subject to inspection by any citizen at any reasonable time.

2. If it shall appear by such report that the declared hotel building referred to in the application does not comply with the provisions of section thirty of this chapter relating to hotels and hotel keepers, the said special deputy commissioner of excise or county treasurer shall not issue a liquor tax certificate to any person proposing to carry on the traffic in liquor at such

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place in connection with the business of keeping a hotel, and the said special deputy commissioner of excise or county treasurer shall immediately notify the police commissioner or other chief police officer of such city or the president of such village, that a liquor tax certificate has been denied. A copy of such notice shall also be mailed to the said commissioner of excise. Every such officer upon receiving such notice, shall at once notify the owner and occupant of said building that the said building does not comply with the laws in relation to hotels; and before any liquor tax certificate shall be issued for such premises a statement must be made by the applicant that the business of keeping a hotel will not be carried on at the said premises. Any taxpayer of a city or village who has reason to believe that any hotel building situate therein for which a liquor tax certificate has been issued upon an application statement by which it appears that the business of keeping a hotel is to be carried on in connection with the traffic in liquors at such premises, does not comply with the provisions of section thirty of this chapter relating to hotels and hotel keepers, may at any time file a statement to this effect, stating his reasons therefor, with the state commissioner of excise. Upon receiving such statement said state commissioner of excise shall, forthwith, cause such hotel building to be inspected and shall file among his records a statement showing in detail the following facts with regard to such building: the number of bedrooms it contains above the basement exclusive of those occupied by the family and servants; whether each bedroom is properly furnished to accommodate lodgers, whether the bedrooms are separated by partitions at least three inches thick extending from the floor to ceiling, whether there is independent access to each bedroom by a door opening into a hallway and whether each bedroom has a window or windows with not less than eight square feet of surface opening upon a street or open court, light-shaft or open air, and whether each bedroom has at least eighty square feet of floor area and at least six hundred cubic feet of space therein; whether such building contains a dining-room which is not a part of the barroom and the area in square feet of such dining-room and whether it is provided with tables and has suitable table furniture and the number of guests for which it has accommodations at one and the same time; also whether such building contains a kitchen and conveniences for

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cooking therein sufficient to provide bona fide meals at one and the same time for ten or twenty guests as required by law. If it appears from the statement that the said building does not comply with the provisions of section thirty of this chapter relating to hotels and hotel keepers, the state commissioner of excise shall forthwith commence proceedings under section twenty-seven of this chapter, to revoke and cancel the liquor tax certificate issued for the said hotel building, upon the ground that at the time of such inspection the said hotel building did not comply with the provisions of section thirty of this chapter, in relation to hotels and hotel keepers, which shall be a sufficient ground for revoking and canceling such certificate, unless in accordance with the demand of the state commissioner of excise said liquor tax certificate shall be immediately surrendered to the officer who issued the same. If any liquor tax certificate shall be surrendered or revoked and canceled as aforesaid, the special deputy commissioner of excise or county treasurer who issued the same shall notify the mayor of the city, the superintendent of buildings of the borough of the city, or the president of the village in which such declared hotel building is situate, and before any liquor tax certificate shall be issued for or transferred to such premises upon an application statement by which it appears that the business of keeping a hotel is to be carried on in connection with the traffic in liquors at such premises, the mayor of the city, the superintendent of buildings of the borough of the city, or the president of the village in which such declared hotel building is situate, shall file a new sworn statement as hereinbefore provided, to the effect that such premises have been made to comply with the provisions of section thirty of this chapter in relation to hotels and hotel keepers.

3. Any person who shall be convicted of the crime of making material false statements in his application for a liquor tax certificate to traffic in liquor in connection with the business of keeping a hotel, or who shall falsely state in such application that the building where such hotel business is proposed to be carried on complies with all the provisions of this chapter as to hotels, and with all of the laws, ordinances, rules and regulations of the state and locality where such building is situated in relation to hotels and hotel keepers, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than

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five hundred dollars, or by imprisonment in a county jail or penitentiary for a term of not more than one year, or by both such fine and imprisonment and shall forfeit the liquor tax certificate or certificates held by him, and be deprived of all rights and privileges thereunder, and of any right to a rebate of any portion of the tax paid thereon and shall be held in custody upon temporary commitment until such certificate or certificates are surrendered to the court in which such conviction is had, by whom the same shall be transmitted to the special deputy commissioner of excise or county treasurer who issued the same.

4. Any person whether holding a liquor tax certificate or not, who shall place on or affix to any building, or adjacent thereto, or suffer or permit any sign, notice or advertisement stating or indicating that such building is a hotel or is conducted as a hotel, or who shall give notice or advertise in any manner that any building owned, occupied, or managed by or for the benefit of such person is a hotel or is conducted as a hotel, shall, if such building does not comply with all of the provisions of section thirty of this chapter applicable to hotels, and with the laws, ordinances, rules and regulations of the state and locality where such building is situated, in relation to hotels and hotel keepers, be guilty of a misdemeanor, and upon conviction shall, if such person be the holder of a liquor tax certificate or certificates, forfeit the same, and be deprived of all rights and privileges thereunder, and of any right to a rebate of any portion of the tax paid thereon, and shall be held in custody upon temporary commitment until such certificate or certificates are surrendered to the court in which such conviction is had, by whom the same shall be transmitted to the special deputy commissioner of excise or county treasurer who issued the same. If the person so convicted is not the holder of a liquor tax certificate, such person shall be punished by a fine of not more than five hundred dollars, or by imprisonment in a county jail or penitentiary for a term of not more than one year, or by both such fine and imprisonment as is provided in this chapter.

5. All sheriffs, deputy sheriffs, police officers, constables, their assistants and helpers and all officers of any building department, their assistants and helpers, and all mayors and village presidents and all persons authorized by them, and all special agents and any assistants and helpers, authorized by the state

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commissioner of excise, may, on any days between the hours of nine o'clock ante meridian and six o'clock post meridian, or at any other time when the same is open, enter and inspect, survey, measure or map any building or premises conducted as a hotel, or claimed or advertised as a hotel, or where a liquor tax certificate has been applied for or obtained upon an application containing the statement that such building complies with the provisions of this chapter relating to hotels, and with the laws, ordinances, rules and regulations of the state and locality where situated in relation to hotels and hotel keepers. Any person who shall forbid, obstruct or prevent the officers named, or any one of their helpers or assistants, from free entry into any such building or premises for the purposes of this chapter shall be guilty of a misdemeanor, and may be forthwith arrested by such officers, helpers or assistants, or any police officer without a warrant, and upon conviction, if he be the holder of a liquor tax certificate or certificates shall forfeit the same, and be deprived of all rights and privileges thereunder, and of any right to a rebate of any portion of the tax paid thereon, and shall be held in custody upon temporary commitment until such certificate or certificates are surrendered to the court in which such conviction is had, by whom the same shall be transmitted to the special deputy commissioner of excise or county treasurer who issued the same. If the person so convicted is not the holder of a liquor tax certificate, such person shall be punished by a fine of not more than five hundred dollars, or by imprisonment in a county jail or penitentiary for a term of not more than one year, or by both such fine and imprisonment as is provided by this chapter.

6. Any mayor, village president, sheriff, deputy sheriff, police officer, constable, superintendent of buildings, or other officer of the building department, of any city, borough or village, commissioner of police, chief of police, superintendent of police, district attorney, assistant district attorney, special agent, special deputy commissioner of excise or county treasurer, who shall neglect or refuse to perform any duty devolving on him under and by virtue of this section, or who shall make a false report thereunder, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than one thousand dollars, or by imprisonment in a county jail or penitentiary for a term of not more than one year, or by both such fine and im-

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prisonment as is provided in this chapter, and shall forfeit his office and all rights thereunder.

This section was derived from the Liquor Tax Law of 1896, § 31b, as added by L. 1905, ch. 698, § 1, and amended by L. 1906, ch. 183, § 1.

Section 32 of the Liquor Tax Law of 1896 is now covered by section 34.

Inspection of premises where liquors are sold: see infra, § 40.

Neglect or omission of duty by public officer: see PENAL LAW, §§ 1841, 1857.

Chapter 697 of 1905.—Chapter 697 of the laws of 1905, providing for the inspection of hotels in 1905 and for the cancellation of certificates in certain cases, was held unconstitutional, as authorizing the revocation of a certificate without notice to the holder and without giving him an opportunity to be heard. People v. Flynn, (1905) 110 App. Div. 279, 96 N. Y. S. 655, affirmed (1906) 184 N. Y. 579, 77 N. E. 1194. And see Born v. Hopper, (1905) 110 App. Div. 218, 96 N. Y. S. 671, affirming 48 Misc. 177, 96 N. Y. S. 671. But the court will not grant an injunction to restrain a Special Deputy Commissioner of Excise from cancelling and taking possession of a certificate pursuant to such statute of 1905. Born v. Hopper, (1905) 110 App. Div. 218, 96 N. Y. S. 671, affirming 48 Misc. 177, 96 N. Y. S. 671. And it was held that the action of the deputy commissioner of excise and the superintendent of buildings in revoking a certificate was not judicial in its nature and would not be reviewed by certiorari. Matter of Leverant, (1905) 110 App. Div. 371, 97 N. Y. S. 272.

§ 33. Search for seizure and forfeiture of liquors kept for unlawful traffic. 1. Liquors kept, stored or deposited in any place in this state after July first, nineteen hundred and eight, for the purpose of sale or distribution therein in violation of the provisions of this chapter, and the vessels in which such liquors are contained, are declared to be a nuisance, and are forfeited to the state when seized, and such forfeiture declared in the manner provided in this section.

2. Upon the verified complaint of a special agent, or of a peace officer, setting forth facts which establish that liquors are kept, stored or deposited in any place in this state for the purpose of unlawful sale or distribution therein within this state, or that there is probable cause for believing that liquors are so kept, stored or deposited, any judge of any city court of record of the city, or any county judge of the county or justice of the supreme court in the judicial district where such liquors are so kept, stored or deposited, shall, if satisfied that there is probable cause to believe that liquors are so kept, stored or deposited, issue his warrant directed to any peace officer, or to a special agent upon his request, commanding him forthwith to search the premises described in said warrant for the liquors specified therein, and to seize such liquors, if found, and the vessels containing the same, and to safely keep such liquors and vessels until final action

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thereon, as in this section provided, and to make immediate return thereon to the judge or justice issuing the same. The complaint shall state the name of the person so keeping, storing or depositing such liquors as aforesaid, and the name of the owner of the premises where such liquors are so stored, kept or deposited, if known to the complainant, together with a description of such premises sufficient to identify the same. The warrant shall contain a notice directed generally to all persons claiming any right, title or interest in such liquors or in the vessels containing the same, to appear before the judge or justice issuing such warrant, at a place and at a time therein specified, not more than twenty days after the issuance of said warrant and not less than ten days after the execution thereof, and show cause why such liquors and the vessels containing the same should not be forfeited to the state; if the warrant be issued by a justice of the supreme court, such warrant and notice may be made returnable at a special term of said court to be held in the judicial district where such liquors are kept, stored or deposited. The warrant must be executed by the special agent or peace officer to whom it is delivered within ten days after the issuance thereof, and such warrant may be executed at any time between the hours of six o'clock in the morning and six o'clock in the afternoon, or if the premises be open, at any other time. The peace officer or special agent executing such warrant is invested with all the powers conferred upon a peace officer in the execution of a search warrant by sections seven hundred and ninety-nine and eight hundred of the code of criminal procedure. Any person who shall forbid, obstruct or prevent any such peace officer or special agent or any accompanying helper or assistant, free entry into or search of any building or premises specified in such warrant, or the seizure of such liquors therein found or the vessels containing the same, during the time above specified, after notice of the authority and purpose of such peace officer or special agent, shall be guilty of a misdemeanor and may be forthwith and without a warrant arrested by such peace officer or special agent. A copy of such warrant shall be delivered to the person so keeping such liquors, if he be present at the time of such seizure, and if he be not present, then to the person, if any, apparently in possession of such liquors or of the premises wherein the same are found, and another copy of such warrant

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shall be posted in a conspicuous place upon said premises. The special agent or peace officer seizing such liquors under said warrant shall give a receipt therefor to the person so keeping such liquors, if present, and if he be not present, then to the person, if any, apparently in possession of such liquors, or in charge of such premises, or in the absence of any such person, he must leave such receipt in the place where the liquors are found. At the time and place specified in the notice contained in such warrant, any person claiming any right, title or interest in the liquors seized under such warrant or in the vessels containing the same may interpose an answer controverting the allegations of the complaint upon which such warrant was issued. If such answer is interposed, the issue thus framed shall be deemed an action pending in the court of the judge or justice who issued the warrant, between the commissioner of excise of the state of New York and the liquor so seized and may be entitled in the name of the said state commissioner of excise and against the liquors so seized, adding for identification the name of the person or persons interposing such answer and claiming or defending the liquors so seized, and shall be tried in said court as other issues of fact are tried therein, and shall be entitled to the preference provided by section seven hundred and ninety-one, subdivision one, of the code of civil procedure. If no answer controverting the allegations of the complaint is interposed, the judge or justice shall proceed to hear the testimony in support thereof. If it be established upon the hearing before said judge or justice or upon the trial of the action, if issue be joined, that the liquors so seized were kept, stored or deposited for the purpose of unlawful sale or distribution within this state, judgment of forfeiture of said liquors and the vessels containing the same to the state shall be entered, which judgment shall provide for the delivery to the state commissioner of excise of such liquors and the vessels in which the same were contained, by the peace officer or special agent who seized the same. Such judgment shall further provide for the sale or destruction, in the discretion of the state commissioner of excise, of such liquors and the vessels in which the same were contained. If, in the judgment of the state commissioner of excise, it is for the best interests of the state that such liquors and containers be destroyed, he shall destroy or cause the destruction of such liquors and containers, but if, in his judgment, it is

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for the best interests of the state to sell the same, he shall cause the same to be sold either at public auction or at private sale. If sold at public auction, he shall give such notice of the time and place of the sale as he shall deem necessary. He may adjourn such sale from time to time and may reject any or all bids made for such liquors or containers or any part thereof. The proceeds of such sale or sales shall be paid over and accounted for in the same manner as are moneys collected under subdivision four of section eight of this chapter. All expenses and disbursements necessarily incurred or made in caring for and selling said liquors, after the entry of said order, by or under the direction of the state commissioner of excise, shall be paid by the state treasurer, on the warrant of the comptroller, when approved by said state commissioner of excise. If the testimony produced on the hearing before said judge or justice, or upon such trial before the court, shall fail to establish that the liquors so seized were kept, stored or deposited for the purpose of unlawful sale or distribution within this state, judgment shall be entered dismissing such complaint and providing that such liquors and the vessels containing the same be returned to the place from which or to the person from whom they were taken. Upon the entry of such judgment, the judge or justice presiding at such hearing or upon such trial shall promptly report to the state commissioner of excise, in writing, the date of the issuing of such warrant, the name and residence of the complainant, the location of the premises searched, giving street and number, if any, the name of the officer or special agent to whom such warrant was delivered, and if liquors were seized, a description of the same and the final disposition thereof. The fees of any peace officer and the necessary expenses of any peace officer or special agent in the performance of his duties under this section shall be a charge on the town or city in which the premises searched are situated, and shall be audited and paid in the same manner as other town and city charges for similar services in criminal proceedings are audited and paid.

3. Liquors seized as hereinbefore provided, and the vessels seized containing them, shall not be taken from the custody of the peace officer or special agent making such seizure by a writ of replevin or other process, while the proceeding or trial is pending.

4. The payment of a retail liquor dealer's or retail malt liquor

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dealer's special United States internal revenue tax for the place and covering the period in which such liquors are seized, or the maintenance or posting in any place where such liquors are seized, of a retail liquor dealer's or retail malt liquor dealer's special United States internal revenue tax stamp in force and effect at the time of such seizure, or the posting, keeping or maintaining of a notice or sign of any kind on or about the premises where such liquors are seized indicating that liquors are there sold, kept or given away at any place where traffic is prohibited under the provisions of section thirteen of this chapter, or any place for which a liquor tax certificate under section eight of this chapter has not been issued, shall be prima facie evidence that the liquors so seized, as aforesaid, were kept, stored and deposited in violation of the provisions of this section. The keeping of liquors in any building, not used exclusively for a dwelling, in which traffic is prohibited under the provisions of section thirteen of this chapter, shall be prima facie evidence that the same are kept in violation of the provisions of this section.

5. No person except one who answers claiming some right, title or interest in the liquor so seized, shall be excused from attending and testifying, or producing any books, papers or other documents before any court or judge or justice, upon any such hearing or trial, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or to subject him to a penalty or forfeiture; but no person shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation, trial or proceeding.

This section was derived from the Liquor Tax Law of 1896, § 31c, as added by L. 1908, ch. 350, § 13.

Subdivision 2 was amended to read as above by L. 1909, ch. 281, § 11; L. 1910, ch. 485, § 7; L. 1913, ch. 614, § 1; L. 1916, ch. 417. The amendment by L. 1909 changed the reading of the ninth sentence by striking out the words "a verified" before the word "answer" where it first occurs in the sentence making it read "an answer." It also struck out the word "verified" before the word "answer" in the sentence beginning "If no answer." The amendment by L. 1910 struck out the word "citizen" which formerly followed next after the words "peace officer' in the first part of the subdivision, and added the provisions which relate to vessels containing liquor. It also added the concluding words which follow the semicolon at the end of the

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third sentence. The amendment by L. 1913 affected and changed the reading of the part of the twelfth sentence which follows the last comma in the sentence. The provisions relating to the disposition of the goods seized and of the expenses were also changed and the sequence of the provisions altered. The amendment by L. 1916 added to the thirteenth sentence the words "or destruction, in the discretion of the state commissioner of excise," and eliminated the words "to the highest bidder, at public auction by or under the direction of the state commissioner of excise, at such time and place and upon such notice as the state commissioner of excise may direct." The fourteenth, fifteenth and sixteenth sentences beginning respectively: "If, in the judgment of the state commissioner . . . . ;" "If sold at public auction . . . "; "He may adjourn such sale . . .," were also added.

Section 33 of the Liquor Tax Law of 1896 is now covered by section 35.

Duty of special agents as to search and seizure: see supra, § 7. *Maliciously procuring search warrant and misconduct in execution thereof:* see PENAL LAW, §§ 1786, 1847.

Statute making possession of liquor prima facie evidence of illegal intent to violate the law: see 1 L. R. A. (N. S.) 626, note.

Power to prohibit the keeping of intoxicating liquor irrespective of any intention to sell it in violation of law: see L. R. A. 1915D 172, note, 26 L. R. A. (N. S.) 394, note.

Right to prohibit possession of intoxicating liquor for personal use: see the following notes: Ann. Cas. 1916E 780, 19 Ann. Cas. 163, 24 L. R. A. (N. S.) 173.

Constitutionality of statutes providing for forfeiture or destruction of liquors illegally kept: see 2 Ann. Cas. 245, note.

Right of private citizen to destroy liquor illegally kept for sale: see 26 L. R. A. (N. S.) 996, note.

Right to compensation for intoxicating liquor seized under a warrant: see 19 L. R. A. 197, note.

Constitutionality.—The validity of this section has been declared. Clement v. May, (1909) 136 App. Div. 199, 120 N. Y. S. 588; Clement v. Two Barrels of Whiskey, etc., (1910) 136 App. Div. 291, 120 N. Y. S. 1044; Farley v. Liquors Seized, etc., (1913) 80 Misc. 32, 141 N. Y. S. 696; Clement v. Four Barrels of Beer, (1910) 66 Misc. 1, 122 N. Y. S. 441.

Nature of proceeding.—A proceeding under this section is to be treated as a proceeding *in rem*, not as a criminal proceeding. Clement v. Two Barrels of Whiskey, etc., (1910) 136 App. Div. 291, 120 N. Y. S. 1044; Matter of Geschwinder, (1910) 68 Misc. 97, 124 N. Y. S. 939. Although this section provides that after the interposition of an answer, the proceeding shall be deemed an action for certain purposes, it is not strictly speaking an action; and for the allowance of costs it is deemed a special proceeding. Farley v. Sixteen Bottles of Champagne, (1912) 153 App. Div. 502, 138 N. Y. S. 276.

Burden of proof.—The complainant to succeed in a proceeding under this section must establish that the liquors seized were kept, stored or deposited for the purpose of unlawful sale or distribution. Farley v. Certain Liquors Seized, (1914) 84 Misc. 104, 146 N. Y. S. 1003.

Bottles not belonging to offender.—The provisions of this section providing for the forfeiture and destruction of vessels containing liquors kept in violation of the law, are not applicable to bottles which do not belong to the offender and are used by him without the owner's consent. Clement v. Rabbach, (1909) 62 Misc. 27, 115 N. Y. S. 162.

Proceeding pending to determine right to sell.—Where the proprietor of a hotel keeps liquors therein pending a determination of the courts as to his right to sell them lawfully, they should not be seized. Farley v. Certain Liquors Seized, (1914) 84 Misc. 104, 146 N. Y. S. 1003.

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Presumption of keeping for illegal sale.— On an issue whether liquors were kept for illegal purposes, where the defense was interposed that after a town voted "dry" on the local option questions the liquors in question were those left over from traffic in a hotel and were not kept for sale, it is error for the court to refuse to charge that the presumption is that the liquors, not having been kept in a place not exclusively used for a dwelling, were kept for illegal sale. The provision in the statute making the keeping of liquors prima facie evidence that they were kept for illegal sale, applies whether the liquors in question were left on hand when the certificate for traffic on the premises expired, or were procured afterwards, or when no certificate has ever been issued; but, where they are left over from former traffic, the rule may not have so great probative force. Farley v. Sixteen Bottles of Champagne, (1912) 153 App. Div. 502, 138 N. Y. S. 276.

Presumption from sale within few days.—The fact that liquors were sold at certain premises on July 4, 1913, is presumptive evidence that the liquors seized on the premises on July 7, 1913, were kept for sale at the date of the seizure. Farley v. Certain Liquors Seized, (1914) 84 Misc. 104, 146 N. Y. S. 1003.

Probable cause for believing liquors are illegally kept.—A complaint alleging an unlawful sale on a certain date at certain premises in a no-license town indicates probable cause to believe that liquors are there kept for illegal sale 26 days later when the complaint is presented to the judge. Matter of Geschwinder, (1910) 68 Misc. 97, 124 N. Y. S. 939.

Complaint on information and belief.—A complaint framed upon information and belief without any statement of the sources of complainant's information or the grounds of his belief, is insufficient; and, on return of the warrant, the person from whose possession the liquors were taken under the warrant, is entitled to an order vacating the complaint and warrant and directing the officer to restore the property. Matter of Huff, (1910) 136 App. Div. 297, 120 N. Y. S. 1070.

Use of same complaint for two warrants at different times.—While the conditions alleged to exist on the 14th of June may form a basis for a petition verified on the 15th and for a warrant issued on such date, for the conditions are presumed to continue, yet after the execution of such warrant and the seizure of liquors on the premises, the conditions are not presumed to continue and the same petition cannot be used to procure another warrant at a subsequent date. Matter of Ingalls, (1912) 77 Misc. 447, 137 N. Y. S. 780.

Demurrer.—There is no provision in the statute for a demurrer, and therefore a motion to dismiss a demurrer which has been interposed in the proceeding, will be granted. Matter of Clement, (1910) 66 Misc. 215, 122 N. Y. S. 999.

Sufficiency of warrant.—The property to be seized is sufficiently specified in the warrant, when the warrant directs a special agent to search certain premises for "liquors as defined in section two of the Liquor Tax Law." Clement v. Two Barrels of Whiskey, etc., (1910) 136 App. Div. 291, 120 N. Y. S. 1044.

Posting copy of warrant.—The statute requires the use of two copies in executing the warrant, one for service upon the person keeping the liquors, and one for posting in a conspicuous place on the premises; and jurisdiction to render a judgment of forfeiture cannot be acquired without the service of the warrant according to the exact terms of the statute. Matter of Ingalls, (1912) 77 Misc. 447, 137 N. Y. S. 780.

Direction of verdict.—A proceeding under this section is one *in rem*, and is of a civil rather than of a criminal nature. Hence, if the evidence is uncontradicted, the court may direct a verdict in favor of the complainant. Clement v. Two Barrels of Whiskey, etc., (1910) 136 App. Div. 291, 120 N. Y. S. 1044.

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Proof sustaining warrant.—A recital in a warrant that the liquors are kept for sale and distribution is sufficiently sustained by proof that the liquors were kept for sale. Matter of Geschwinder, (1910) 68 Misc. 97, 124 N. Y. S. 939.

Single gift as indicating unlawful purpose.—"A single gift of liquors is not, in and of itself, sufficient to prove an unlawful purpose in keeping the liquors, when the person who has them has obtained a license which justifies his keeping them for a lawful purpose. Green v. Certain Liquors, (1916) 173 App. Div. 686, 160 N. Y. S. 126.

Costs.— Upon the interposition of an answer under this section by a person claiming title to the seized liquors, the matter becomes a special proceeding in which costs are allowed to the prevailing party under section 3240 of the Code of Civil Procedure. Farley v. Sixteen Bottles of Champagne, (1912) 153 App. Div. 502, 138 N. Y. S. 276. A claimant, if successful, is entitled to costs. Farley v. Certain Liquors Seized, (1914) 84 Misc. 104, 146 N. Y. S. 1003. But see Clement v. Harden, (1909) 62 Misc. 31, 114 N. Y. S. 751, holding that the defendant, though successful upon the trial, is not entitled to costs.

Appeal.—A proceeding under this section is in the nature of a special proceeding, and appeals from orders in the proceeding are governed by the general provisions applicable to special proceedings. Matter of Huff, (1910) 136 App. Div. 297, 120 N. Y. S. 1070. There is nothing in this section which limits the right of the commissioner of excise to appeal from a judgment against him rendered upon a verdict of a jury in favor of a claimant, and such right of appeal is secured by section 1346 of the Code of Civil Procedure. Clement v. Liquors Seized, etc., (1911) 143 App. Div. 923, 128 N. Y. S. 631.

§ 34. Sales and pledges; when void. No recovery shall be had in any civil action, to recover the purchase price of any sale on credit of any liquor, to be drunk on the premises, where the same shall be sold. All securities given for such debts shall be void. Any person taking such security, with intent to evade this section, shall forfeit a penalty of fifty dollars for each offense. Each assignment, sale or pledge of articles or property exempt, by law, from execution, and every levy or sale of such articles or property by virtue of an execution by consent of the defendant therein, shall be void, where the consideration, or any part thereof, for which such assignment, sale or pledge was made, or for the debt on which judgment was rendered in any court and on which such execution was issued, was for the sale of liquors.

This section was derived from the Liquor Law of 1896, § 32, as amended by L. 1897, ch. 312, § 23.

Section 34 of the Liquor Tax Law of 1896 is now covered by section 36.

Recovery of price of liquors sold illegally within state: see 7 Ann. Cas. 360, note.

Validity of insurance on intoxicating liquors as affected by liquor laws: see 31 L. R. A. (N. S.) 874, note.

Embezzlement of proceeds of liquor sold in violation of law: see 27 L. R. A. (N. S.) 415, note.

Note for purchase price of liquors.—A note given by a father for liquors

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sold to his son is within the condemnation of this section, and no recovery can be had thereon. Not only is the action in effect one to recover the purchase price of liquors, but the note may be considered a security within the term "securities" as used in the section. Wagner v. Scherer, (1903) 89 App. Div. 202, 85 N. Y. S. 894.

Purchase price of liquors to be unlawfully retailed.—The knowledge of the seller of a quantity of liquors that the purchaser intended to retail them unlawfully without a license, is not a defense in an action for the purchase price thereof. Kreiss v. Seligman, (1850) 8 Barb. 439; Lewin v. Johnson, (1884) 32 Hun 408.

§ 35. Persons liable for violations of this chapter. Any person engaged in the traffic in liquors whether as officer of a corporation, or association, or as a member of a copartnership, or an individual, shall upon conviction of a violation of any of the provisions of this chapter be liable for and suffer the penalties imposed therein; and any clerk, agent, employee or servant shall be equally liable as principals for any violation of the provisions of this chapter, and except as hereinafter provided, each violation of any of the provisions of this chapter shall be construed to constitute a separate and complete offense, and for each violation on the same day, or on different days, the person or persons offending shall be liable to the penalties and forfeitures imposed by this chapter; and in section thirty-six providing for penalties and forfeitures when corporations or associations are referred to, and penalties and forfeitures are imposed thereon, the same shall be understood to mean and apply to the officers of such corporation or association. All violations of this chapter, committed by any person on the same day, shall together constitute but one crime, which shall be denominated the crime of "violating the liquor tax law," and it shall be competent to prove, on the trial or hearing, each separate violation committed on said date, provided each violation proved is set forth in the indictment, charge or complaint, in general or specific terms.

This section was derived from the Liquor Tax Law of 1896, § 33, as amended by L. 1908, ch. 350, § 14. It was amended to read as above by L. 1909, ch. 281, § 13. The amendment made definite the reference to section 36. The former reference was to "the following section."

Section 35 of the Liquor Tax Law of 1896 is now covered by section 37.

Jurisdiction of offenses: see infra, §§ 36, 37, 38. *Information for proceedings before magistrate:* see infra, § 37.

Liability for violation of Liquor Law of person who acts as agent or messenger for purchaser: see Ann. Cas. 1912C 633, note.

Criminal liability of master for violation of Liquor Law by servant: see 13 Ann. Cas. 708, note. *Liability of licensee for illegal sale of intoxicating liquors by his servant against instructions:* see 13 Ann. Cas. 324, note; Ann. Cas. 1912A 1109, note; Ann. Cas. 1915B 380, note. *Burden of proof as to*

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license or permit in prosecution for sale without license of intoxicating liquors by agents or servants: see 36 L. R. A. (N. S.) 100, note. *Personal liability of agent or servant of liquor dealer for violation of Liquor Law:* see 19 Ann. Cas. 582, note. *Liability of partner for illegal sale of liquor by copartner:* see 8 Ann. Cas. 276, note. *Criminal liability for violation of Liquor Law by partner, servant or agent:* see the following notes: 41 L. R. A. (N. S.) 660, 33 L. R. A. (N. S.) 419, 20 L. R. A. (N. S.) 321, 16 L. R. A. (N. S.) 786.

Knowledge necessary to charge owner with conduct of tenants or others in selling intoxicating liquor on premises in violation of injunction: see 25 L. R. A. (N. S.) 602, note.

Criminal responsibility of purchaser of intoxicating liquors illegally sold: see 46 L. R. A. (N. S.) 409, note. *Purchaser as witness:* see 46 L. R. A. (N. S.) 410, note.

Liability of one who sells liquor to another for criminal acts of latter while intoxicated: see Ann. Cas. 1913A 511, note.

Criminal liability of corporation for violation of Liquor Law: see Ann. Cas. 1916C 465, note.

Several offenses growing out of same facts: see 31 L. R. A. (N. S.) 707, note; 45 L. R. A. 858, note.

Joint or several judgment and sentence in case of two or more defendants jointly convicted of illegal sale of liquor: see Ann. Cas. 1913C 77, note.

Indictment for sales to different persons on same day.— Before the enactment of the amendment to this section authorizing the joinder of all violations on the same day in one indictment, it was held that one indictment could charge a sale to two different persons on the same day without being subject to demurrer, but only one violation could be proved on the trial. People v. Huffman, (1897) 24 App. Div. 233, 48 N. Y. S. 482. And an indictment charging a joint sale to two persons was not necessarily defective. People v. Schmidt, (1897) 19 Misc. 458, 44 N. Y. S. 607. In People v. Adams, (1837) 17 Wend. 475, the indictment charged that the defendant on a certain day, and on divers other days and times, sold by retail to divers citizens of this state and to divers persons to the grand jury unknown, etc., and it was held that only one sale was alleged, and consequently the objection that more than one crime was alleged was not well taken.

Joint indictment for different sales on same day.—Where the proprietor of a saloon makes a wrongful sale of liquor on Sunday and later in the day his brother, a bartender, makes a similar sale in the same saloon, both may be jointly indicted and convicted. People v. Kozak, (1913) 156 App. Div. 460, 142 N. Y. S. 39. And see People v. Schmidt, (1897) 19 Misc. 458, 44 N. Y. S. 607, holding that an indictment alleging a sale by two persons is not necessarily defective, for if they jointly committed the offense they were properly joined.

Sales on different days.—This section makes separate offenses of violations on different days, and hence an indictment alleging two offenses on two different days is demurrable. People v. O'Donnell, (1887) 46 Hun 358, 15 N. Y. St. Rep. 141. Thus, an indictment is insufficient if it alleges a sale on a certain Sunday and a gift on an entirely different Sunday. People v. Harmon, (1888) 49 Hun 558, 2 N. Y. S. 421, 18 N. Y. St. Rep. 820, affirmed (1889) 112 N. Y. 666, 667, 20 N. E. 414.

This section makes each violation on different days a separate offense, and, hence, in a prosecution for a sale to a minor, it is improper to introduce evidence showing a similar sale to the same person on another date than the time of the offense charged in the indictment. People v. Andrus, (1902) 74 App. Div. 542, 77 N. Y. S. 780.

In a prosecution for a sale without a certificate, each sale constitutes a separate offense, and the acquittal of the defendant on the charge of selling after a certain date is not a bar to an indictment for a sale made prior to such date. People v. Sinell, (1892) 131 N. Y. 571, 30 N. E. 47.

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Different counts.—The indictment may set forth in three different counts the same offense in three different ways. People v. Brede, (1897) 1 Liq. Tax Law Rep. 174. Thus, an indictment for traffic on Sunday may allege a sale in one count, a gift in another, and an offering or exposing for sale in a third count. People v. Brede, (1897) 1 Liq. Tax Law Rep. 174. And an indictment for an illegal sale on Sunday may charge in the first count an illegal sale and in the second count an offering or exposing for sale. People v. Haren, (1901) 35 Misc. 590, 72 N. Y. S. 205. One indictment may allege an unlawful sale in three different counts: (1) by exposing for sale; (2) by a sale and delivery; (3) by giving away liquor. People v. McDonnell, (1908) 108 N. Y. S. 749. One count may charge a wrongful sale without having paid the tax and posted the certificate, and a second count may charge the selling by the same defendant to the same person on the same day at the same place in the same manner, and differing only from the first count in relating that the liquor was in fact drunk upon the premises where sold. People v. Smith, (1898) 1 Liq. Tax Law Rep. 342.

Designation of crime.—The designation of a violation of section 30 as the crime of offering and exposing for sale fermented liquors and distilled and rectified spirits in violation of section 30 of the Liquor Tax Law of the state of New York, is sufficient to comply with sections 275 and 276 of the Code of Criminal Procedure prescribing the form of indictments. People v. Seeley, (1905) 105 App. Div. 149, 93 N. Y. S. 982, affirmed (1905) 183 N. Y. 544, 76 N. E. 1102.

Name of purchaser.—An indictment for a wrongful sale of liquor need not necessarily state the name of the purchaser; but it is sufficient if it states that the name is unknown to the grand jury. People v. Brede, (1897) 1 Liq. Tax Law Rep. 174. But the indictment must either state the name or state that his name is unknown. People v. Ferranto, (1898) 1 Liq. Tax Law Rep. 411. An indictment for selling liquor without a license need not allege the name of the persons to whom it is claimed the liquor was sold, but it is sufficient if it alleges a sale to divers citizens of the state and to divers persons to the grand jurors unknown. People v. Adams, (1837) 17 Wend. 475. On the trial of an indictment charging a sale to persons whose names were to the grand jury unknown, the prosecution is not bound to prove a joint sale, but may prove a sale to one individual. People v. Seeley, (1905) 105 App. Div. 149, 93 N. Y. S. 982, affirmed (1905) 183 N. Y. 544, 76 N. E. 1102.

Under the early practice an indictment charging the defendant with unlawfully selling strong and spirituous liquors to a certain person on a certain date and to divers other citizens, was proper, though it did not name any other persons, and under such an indictment, the prosecution would not be compelled to elect as to the kind of liquor sold the named person. Osgood v. People, (1868) 39 N. Y. 449.

A conviction upon a plea of guilty to an indictment alleging a sale of liquors on a certain date to a named person and to others and divers persons to the grand jury unknown, is a bar to any further prosecution for a sale on such date, though the second prosecution is based on a sale to a person not specifically mentioned in the former indictment. People v. Satchwell, (1901) 61 App. Div. 312, 70 N. Y. S. 307.

Particularity in manner of violation of law.—An indictment charging that the defendant wrongfully and unlawfully sold certain liquors without specifying the particular manner in which the law was violated, is insufficient. People v. Bates, (1901) 61 App. Div. 559, 71 N. Y. S. 123.

Description of liquors sold.—Section 2 of the Liquor Tax Law defines the term "liquors," and hence it is not necessary that an indictment for an illegal sale of liquors should particularly allege the kind or quantity of liquor sold; but an indictment is sufficient which charges a violation of section 30 in that the defendant sold "certain liquors in quantities less than

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five wine gallons at a time" against the form of the statute, etc. People v. Myers, (1905) 109 App. Div. 143, 95 N. Y. S. 993, affirmed (1906) 185 N. Y. 558. It is not required that the indictment allege that the liquor was intoxicating. People v. Cox, (1905) 106 App. Div. 299, 94 N. Y. S. 526. An indictment in the language of the statute that the defendant offered and exposed for sale "fermented and malt liquors in quantities of less than five wine gallons at a time," is sufficient. People v. McDonnell, (1908) 108 N. Y. S. 749.

Negativing exceptions.—An indictment of a hotel keeper for a sale on Sunday need not negative the exception in section 30, subdivision N, relative to sales to guests during prohibited hours. People v. Haren, (1901) 35 Misc. 590, 72 N. Y. S. 205; People v. Brede, (1897) 1 Liq. Tax Law Rep. 174.

In an action on a bond under section 16 against a so-called club and its surety for a sale between one and five in the morning, it is not necessary that the complaint negative the provisions in section 30, subdivision O, relative to bona fide clubs. Cullinan v. Criterion Club, (1902) 39 Misc. 270, 79 N. Y. S. 482, affirmed without opinion 86 App. Div. 626, 83 N. Y. S. 1104. But an indictment for a violation of subdivision G of section 30 relative to having an open entrance to the barroom during prohibited hours, should negative the exception contained in the section relative to the ingress and egress of the certificate holder and others mentioned. People v. Lupton, (1907) 52 Misc. 336, 103 N. Y. S. 172. In Jefferson v. People, (1885) 101 N. Y. 19, 3 N. E. 797, it was held that an indictment for selling liquors without a license under the Excise Law of 1857, need not negative that the accused did not have a license as authorized by chapter 856 of the laws of 1869.

Cited.— People v. D'Antonio, (1912) 150 App. Div. 109, 134 N. Y. S. 657; People v. Manganaro, (1912) 76 Misc. 293, 137 N. Y. S. 82.

§ 36. Penalties for violations of this chapter. 1. Any person trafficking in liquors, who is prohibited from so doing by reason of the result of a vote on the local option questions[1] or who[2] traffics without having lawfully obtained a liquor tax certificate; or contrary to the provisions of section thirteen of this chapter; or who shall neglect or refuse to make application for a liquor tax certificate, or give the bond, or pay the tax imposed as required by this chapter, shall be guilty of a misdemeanor, and upon conviction therefor shall be punished by a fine of not less than two hundred dollars nor more than twelve hundred dollars,[3] and shall also be imprisoned in a county jail or penitentiary for a term of not less than thirty days nor more than one year.

2. Any person who shall make any false statement in the application required to be presented to the county treasurer or other officer to obtain a liquor tax certificate, or to obtain a transfer thereof, or who shall violate any of the provisions of section eight,

[1] Words "by reason of the result of av ote on the local option questions," new.

[2] Word "so" omitted.

[3] Proviso that fine equal at least one-half of annual liquor tax, omitted.

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nineteen, twenty, twenty-one, twenty-three, twenty-nine or thirty shall be guilty of a misdemeanor, and upon conviction therefor shall be punished by a fine of not more than five hundred dollars or by imprisonment in a county jail or penitentiary for a term of not more than one year, or by both such fine and imprisonment, and shall forfeit the liquor tax *certificate held by him at the date of such conviction,[1] and be deprived of all rights and privileges thereunder, and for any right to a rebate of any portion of the tax paid thereon, and if the person convicted be a pharmacist holding a license issued by the board of pharmacy, the said board of pharmacy shall, in addition to said penalties, immediately revoke said license, and no liquor tax certificate shall be issued to any person to traffic in liquors at said store or place, under subdivision three of section eight of this chapter for the term of one year from the date of said conviction; but this clause does not apply to violations of section thirty of this chapter, by a person not holding a liquor tax certificate, or by a person who is prohibited from trafficking in liquors by reason of the result of a vote on the local option questions,[2] the punishment for which is provided in the first clause of this section.

3. If within a period of two years,[3] there shall be two convictions of clerks, agents, employees, or servants of a holder of a liquor tax certificate, for a violation of any provision of this chapter, the liquor tax certificate of the principal, held by him at the date of the second conviction,[4] shall be forfeited, and the said principal shall be deprived of all rights and privileges thereunder, and of any right to any rebate of any portion of the tax paid thereon.

4. No liquor tax certificate shall be issued to any person convicted of a violation of this chapter within three years from the date of such conviction, nor shall any such person have any interest therein, or become a surety on any bond, required under section sixteen of this chapter, during such period.

5. Any wilful violation by any person of any provision of this chapter, for which no punishment or penalty is otherwise provided, shall be a misdemeanor.

* So in original.

[1] Words "held by him at the date of such conviction," new.

[2] Words "or by a person who is prohibited from trafficking in liquors by reason of the result of a vote on the local option questions," new.

[3] Words "within a period of two years," new.

[4] Words "held by him at the date of the second conviction," new.

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6. Whenever any fine is imposed upon conviction for violation of any provision of this chapter, the judgment in such case must provide that the person thus fined be imprisoned until the fine is satisfied, which imprisonment can not exceed one day for every dollar of the fine, nor be less than one day for every five dollars of the fine.

7. If the holder of any liquor tax certificate shall be convicted of keeping a disorderly house, in violation of section eleven hundred and forty-six of the penal law, or in violation of any municipal ordinance prescribing the same or any similar offense, or be convicted of any offense prescribed in articles eighty-eight or one hundred thirty of the penal law, or be convicted of the same or any similar offense prescribed in any municipal ordinance, or be convicted of any felony whatsoever, said certificate holder shall forfeit any and every liquor tax certificate held by him at the time of such conviction, and be deprived of all rights and privileges thereunder. If any clerk, agent, employee or servant of a holder of a liquor tax certificate shall commit any of such offenses at a place for which a liquor tax certificate has been issued, and be convicted thereof, the holder of such liquor tax certificate shall forfeit the same, and be deprived of all rights and privileges thereunder.

8. Upon the forfeiture of any liquor tax certificate, as provided by this section, it shall be the duty of the holder of said certificate, or of any other person having such certificate in his possession or under his control, to immediately surrender such certificate to the officer who issued the same or to his successor in office, who shall forward the same to the state commissioner of excise for cancellation. In case such certificate be not forthwith surrendered, it shall be the duty of the officer who issued the said certificate or his successor in office, immediately upon receiving notice of the forfeiture of any certificate, as provided in this section, or upon the request of the state commissioner of excise, to sign duplicate written demands for the surrender of said certificate, setting forth the conviction or convictions causing such forfeiture, and to deliver said demands to the sheriff of the county in which the premises designated in said certificate are located, or to any special agent of the state commissioner of excise, together with a certified copy of the record of each conviction referred to in such demands, and it shall be the duty of said sheriff or special

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agent, immediately upon the receipt of said duplicate demands and such record or records of conviction, to serve one of such demands, together with such record or records of conviction, upon the holder of said certificate, or upon any other person having such certificate in his possession or under his control, and to take possession of such certificate and to return the duplicate of said demand, with proof of the service thereof and of such record or records of conviction, together with said certificate, to said issuing officer. The sheriff making such service shall be entitled to the same fees therefor as for serving a summons in an action in the supreme court, which fees, and any other fees which said sheriff would be by law entitled to receive from the state commissioner of excise, shall be legal charges against the county in which the office of the said sheriff is situated, and shall be audited and paid as are other lawful claims.

This section was derived from the Liquor Tax Law of 1896, § 34, as amended by L. 1897, ch. 312, § 24; L. 1899, ch. 398, § 2; L. 1900, ch. 367, § 11; L. 1903, ch. 486, § 15; L. 1905, ch. 680, § 4, and L. 1908, ch. 350, § 15. It was amended to read as above by L. 1910, ch. 485, § 8. The amendments are given in the footnotes.

Section 36 of the Liquor Tax Law of 1896 is now covered by section 39.

Action on bond for violation of law: see supra, § 16. *Cancellation of certificate for violation of law:* see supra, § 27. *Forfeiture of rebate on surrender of certificate:* see supra, § 24. *Action to recover penalties:* see infra, § 43; *jurisdiction of courts:* see infra, §§ 37, 38.

Certiorari upon refusal to issue or transfer certificate, and of revocation and cancellation: see supra, § 27.

Impossibility of securing license as defense to prosecution for selling liquor without license: see 18 Ann. Cas. 95, note. *Inducement to violate Liquor Law with view to prosecution therefor as defense to such prosecution:* see Ann. Cas. 1916C 732, note; 17 Ann. Cas. 296, note; 51 L. R. A. (N. S.) 825, note. *Ignorance of character of liquors as defense:* see 12 Ann. Cas. 472, note. *Mistake in beverage as defense of illegal sale:* see 21 L. R. A. (N. S.) 525, note; 6 L. R. N. S. S. 477, note. *Inquiry into validity of license produced by defendant in prosecution for sale of liquors without license:* see 12 Ann. Cas. 714, note. *Proof of other offenses in prosecution for violation of Liquor Law:* see 18 Ann. Cas. 846, note. *Conviction or acquittal of sale of liquor as a bar to a prosecution for sales made prior to the first indictment:* see 45 L. R. A. (N. S.) 977, note.

Burden of proof of right to sell in prosecution for illegal sale of liquor: see Ann. Cas. 1913C 626, note. *Right of accused to have prosecution elect between several acts proven as violations of Liquor Law:* see 20 Ann. Cas. 1070, note.

Necessity of alleging price or consideration in prosecution for unlawful sale of liquor: see 19 Ann. Cas. 693, note. *Necessity of alleging name of purchaser in prosecution for unlawful sale of intoxicating liquor:* see 13 Ann. Cas. 128, note; 4 Ann. Cas. 98, note. *Necessity of alleging and proving intoxicating quality in prosecution for illegal sale of liquor:* see 13 Ann. Cas. 117, note.

Cruel and unusual punishment for violation of Liquor Law: see 19 Ann. Cas. 730, note; 35 L. R. A. 574, note.

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Judgment in criminal proceeding as res judicata in civil or penal action under Liquor Law: see 21 Ann. Cas. 1187, note.

Municipal ordinance for punishment of sale which is prohibited by statute: see 17 L. R. A. (N. S.) 49, note.

Necessity for indictment or information for sale of intoxicating liquors contrary to prohibitory statute or ordinance stating name of purchaser: see 23 L. R. A. (N. S.) 582, note.

Necessity and sufficiency of description of offense in bail bond or recognizance: see 38 L. R. A. (N. S.) 317, note.

Constitutionality.—"Under subdivision 3 of section 34 [now section 36], in an action on a bond or in a proceeding to forfeit and cancel a liquor tax certificate, or in a proceeding to compel the payment of a rebate, proof of two convictions of clerks, agents, employees or servants of the certificate holder is sufficient to forfeit the certificate and to deprive the principal of any right to a rebate. Here two convictions of employees is made conclusive proof of the violation by the principal and nothing more need be shown than the record of such convictions. That it was within the power of the legislature to enact such a rule of evidence as condition to permitting the traffic in liquor is undoubted and is not questioned." People v. Clement, (1909) 134 App. Div. 462, 119 N. Y. S. 374.

Construction.—The provisions of this section relative to forfeitures are to be strictly construed, and any doubt arising is to be resolved in favor of the accused. Matter of Farley, (1913) 143 N. Y. S. 305.

Indictment.—"The criminal penalties authorized by the act, and required to be imposed in case of conviction, are two in number, and so widely divergent as to necessitate entirely different averments in the information, so that, as required by subdivision 7 of section 284 of the Code of Criminal Procedure, the court may be able to pronounce judgment, upon a conviction, according to the right of the case." People v. Locatelli, (1910) 160 N. Y. S. 863.

Penalties for unauthorized sale by licensee and sale without license contrasted.—"It is apparent that the legislature regarded the trafficking in liquors without a license of any kind, in violation of section 30, as a more serious offense than any violation of the Liquor Tax Law committed by a licensed person, who is prohibited from trafficking in liquor to be drunk where sold, and that a sharp distinction between such unlicensed and licensed offenders of said section 30 should be made in the character of the punishment provided. The former sells without any authority, and in the case of the latter there is an inhibition against a sale of liquor to be drunk on the premises. This clause under consideration seems to prohibit the punishment being imposed in accordance with subdivision 2 of section 36 for a violation of section 30 by a person not holding a license; that is, by a person who is not authorized to traffic in liquors at all." People v. Rolandelli, (1915) 160 N. Y. S. 766.

Necessity of fine.—Under the first subdivision of this section, when originally enacted in the Liquor Tax Law of 1896, the imposition of a fine was required, but the addition of a term of imprisonment was discretionary. A term of imprisonment could not be imposed unles a fine was also imposed. People v. Wood, (1900) 2 Liq. Tax Law Rep. 243.

Imprisonment as alternative for non-payment of fine.—When the Liquor Tax Law of 1896 was originally enacted, one convicted of a violation of the law could not be sentenced to pay a fine and to stand committed to the county jail until paid, not to exceed one day for each dollar imposed as a fine. People v. Hazard, (1898) 23 Misc. 477, 52 N. Y. S. 670; People v. Stock, (1898) 26 App. Div. 564, 50 N. Y. S. 483, affirmed (1898) 157 N. Y. 681, 51 N. E. 1092; People v. Kinney, (1897) 1 Liq. Tax Law Rep. 186. Under the Excise Law of 1892, however, one convicted of a violation of the statute could be imprisoned until the fine was paid, not to exceed one day

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for each dollar of the amount of the fine. People v. Shaver, (1899) 37 App. Div. 21, 55 N. Y. S. 701.

Remission of fine.—The court of special sessions in the city of New York has power to remit a fine imposed for a violation of the Liquor Tax Law, without substituting therefor an additional punishment. People v. Court of Special Sessions, (1915) 170 App. Div. 575, 156 N. Y. S. 61, affirmed (1906) 217 N. Y. 674 mem.

Suspension of sentence.—The court has power to suspend the execution of a sentence of one convicted of violating the Liquor Tax Law. Such power exists at common law, arising from the inherent power of the court over its own decrees. People v. Kaiser, (1916) 95 Misc. 681, 159 N. Y. S. 322.

Forfeiture for conviction of certificate holder.—A person convicted in the Court of Special Sessions of New York City of the offense of selling liquor on Sunday, forfeits his certificate, though he has no right of appeal from the judgment of conviction. Dornhoefer v. Farley, (1914) 161 App. Div. 600, 146 N. Y. S. 891. One convicted of a violation of section 1146 of the Penal Law relative to disorderly houses, forfeits his certificate, though the second count of the indictment also charges a violation of section 432 of the Penal Law. Matter of Farley, (1913) 143 N. Y. S. 305.

Forfeiture of certificate held at time of conviction of holder.— Before the insertion in subdivision 2 of the words "held by him at the date of such conviction," it was held that the forfeiture of the certificate provided for in this section related to the certificate held at the time of the violation, not a subsequent one held at the time of the conviction, and that the subsequent one could be cancelled only in proceedings under section 27. Marquardt v. Clement, (1910) 68 Misc. 96, 124 N. Y. S. 934. Where a certificate was issued on April 25th, to go into effect on May 1st, it was held that it was not forfeited by a conviction on April 26th for a Sunday sale under a certificate then in force. People v. Lyman, (1898) 25 Misc. 217, 55 N. Y. S. 76.

Forfeiture for violations by employees.—The second offense for which the conviction of an employee is had, need not have been committed after the first violation if committed after the first offense, though before conviction therefor, the second conviction forfeits the certificate. Suss v. Farley, (1914) 164 App. Div. 161, 149 N. Y. S. 661.

Before the amendment of this section in 1910 defining the limitation of two years for the two convictions, it was held that the certificate would be forfeited for two convictions of employees, when both convictions were during the lifetime of the same certificate but one of the offenses occurred during the lifetime of a prior certificate held by the same principal. Teschmacher v. Clement, (1910) 198 N. Y. 556, 92 N. E. 1104, affirming 135 App. Div. 538, 120 N. Y. S. 537.

One violation by employee.—A single conviction of an employee for a violation of the law, may be sufficient to deprive the certificate holder of a rebate on the surrender of his certificate. People v. Clement, (1909) 134 App. Div. 462, 119 N. Y. S. 374, reversing 63 Misc. 369, 116 N. Y. S. 1098. See also People v. Cullinan, (1903) 41 Misc. 404, 84 N. Y. S. 1018, affirmed without opinion 90 App. Div. 606, 85 N. Y. S. 1142.

Forfeiture as bar to proceeding for cancellation.—The forfeiture of a liquor tax certificate under the provisions of subdivisions 3 and 8 of this section by the conviction of employees, does not bar a proceeding for the cancellation of the certificate on the ground that the premises had become disorderly. Matter of Farley, (1914) 164 App. Div. 802, 150 N. Y. S. 300.

Liability of surety.— Upon the conviction of a certificate holder for the violation of the statute, the surety is liable, not only to the amount of the fine imposed, but is liable under section 16 for the penalty of the bond. Lyman v. Rochester Title Ins. Co., (1899) 37 App. Div. 234, 55 N. Y. S. 770.

Cited.— People v. Tomasso, (1916) 172 App. Div. 711, 159 N. Y. S. 197;

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People v. D'Antonio, (1912) 150 App. Div. 109, 134 N. Y. S. 657; Haywood v. Lockwood, (1915) 90 Misc. 31, 152 N. Y. S. 483; People v. Parisi, (1911) 147 App. Div. 466, 131 N. Y. S. 882; People v. Manganaro, (1912) 76 Misc. 293, 137 N. Y. S. 82.

37. Jurisdiction of courts; reports of courts and court clerks; reports of magistrates. 1. Except as otherwise provided by this chapter, all proceedings instituted for the punishment of any violations of the provisions of this chapter, the penalties for which are prescribed in subdivision one, two, three or four of section thirty-six, shall be prosecuted by indictment by the grand jury of the county in which the crime was committed, and by trial in a court of record having jurisdiction for the trial of crimes of the grade of felony; except that any magistrate of the county in which such violations occur shall have jurisdiction, and shall examine on oath the informant or prosecutor and any witnesses he may produce, and shall issue subpœnas for such witnesses as may be named by such prosecutor or informant and examine them on oath, and shall issue a warrant of arrest upon such information and depositions, and shall examine the case as provided by chapter two of title three of the code of criminal procedure; except that where the defendant is required to be taken before the magistrate who issued the warrant, he may, if that magistrate be absent or unable to act, be taken before any magistrate in the county in which the magistrate before whom the warrant is returnable resides, but if it shall appear upon such examination that a crime, not triable by a court of special sessions, has been committed, and that there is sufficient cause to believe that the person or persons charged with such crime are guilty thereof, such magistrate shall admit such person or persons to bail, in a sum not less than one thousand dollars, and in default of bail shall commit him or them to the sheriff of the county or if in the city of New York to the keeper of the city prison of the city of New York. A magistrate before whom any person shall be brought, charged with a violation of the provisions of this chapter, shall immediately notify the state commissioner of excise in writing of the fact of such arrest and the disposition of the case, stating the name and residence of each person accused; the date when held for trial or discharged; the name, residence and address of the complainant, and of each witness sworn in support of the charge in case a preliminary examination shall have been

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had, and shall at the same time transmit a duplicate copy of such report to the district attorney of the county.

2. Counts of special sessions shall have exclusive jurisdiction to try and determine, according to law, all violations of the liquor tax law defined by subdivision five of section thirty-six as a misdemeanor. Any person convicted in a court of special sessions for violation of any of the provisions of this chapter shall be punished according to the provisions hereof.

3. The court or officer before whom any person shall be tried for a violation of any provision of this chapter or the clerk of the court, if there be a clerk, shall forthwith mail or deliver to the state commissioner of excise a certified statement of the dispostition of said case, giving the date thereof, the name of the defendant, the date and place of violation and the name of each witness sworn in support of the charge.

This section was derived from the Liquor Tax Law of 1896, § 35, as amended by L. 1897, ch. 312, § 25; and L. 1908, ch. 350, §§ 16, 17.

Section 37 of the Liquor Tax Law of 1896 is now covered by section 40.

Indictments: see supra, § 35. *Jurisdiction of Courts of Special Sessions in New York City:* see infra, § 38.

Sunday sale by one not having certificate.—A county court has jurisdiction of a prosecution for a sale of liquors on Sunday by one not having a liquor tax certificate. People v. Post, (1914) 163 App. Div. 119, 148 N. Y. S. 487.

Intoxication in public place.—When the provisions relative to intoxication in a public place were a part of the Liquor Tax Law, it was held that Courts of Special Sessions had exclusive jurisdiction thereof, and that there was no authority for a certificate under section 57 of the Code of Criminal Procedure requiring the prosecution by indictment. People v. Mulkins, (1898) 25 Misc. 599, 54 N. Y. S. 414. See also People v. Markell, (1897) 20 Misc. 149, 45 N. Y. S. 904, holding that a Court of Special Sessions has jurisdiction of the offense of intoxication in a public place. See PENAL LAW, § 1221.

Disorderly premises.—The offense of permitting the premises to become disorderly, as defined in subdivision E of section 30, is triable by indictment; and the City Court of Corning has no jurisdiction thereof. People v. Tomasso, (1916) 172 App. Div. 711, 159 N. Y. S. 197.

Obstruction of view of premises.—Before subdivision 2 of section 36 was amended so as to include within its purport all violations of section 30, it was held that subdivision H of section 30, relative to the obstruction of the view of premises, was covered not by subdivision 2 of section 30, but by subdivision 5, and therefore the offense was triable at Special Sessions and not by indictment. People v. Palmer, (1899) 2 Liq. Tax Law Rep. 30.

Unlocked entrance on Sunday.—A violation of subdivision G of section 30, if committed by the certificate holder or one interested in the business, is to be prosecuted by indictment; but, if committed by a stranger it is not indictable. People v. Graceffo, (1911) 143 App. Div. 728, 128 N. Y. S. 646, affirmed (1911) 202 N. Y. 574, 96 N. E. 1124. See also People v. Dooling, (1896) 1 Liq. Tax Law Rep. 17. But under the Liquor Tax Law of 1896 it was held that the offense was within the exclusive jurisdiction of Courts of Special Sessions, though it was committed by the certificate holder. People v. Chase, (1899) 41 App. Div. 12, 58 N. Y. S. 292.

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Insufficient information to give jurisdiction.—An information laid before a magistrate, charging that a certain named person and other persons not named did commit the crime of misdemeanor in that they did on and after a certain date in a certain town, unlawfully willfully and knowingly violate the Liquor Tax Law, is insufficient under sections 148 and 149 of the Code of Criminal Procedure to confer jurisdiction upon the magistrate, and a writ of prohibition may issue against the person purporting to act as a magistrate. People v. Tuthill, (1903) 79 App. Div. 24, 79 N. Y. S. 905.

Information by police officers.— Under this section a magistrate has jurisdiction of an information made by a police officer charging a violating of the Liquor Tax Law. Section 40 requiring police officers to report violations to the district attorney, does not abridge the jurisdiction of a magistrate under this section. People v. Schatz, (1900) 50 App. Div. 544, 64 N. Y. S. 127.

Information in the alternative.—An information charging that a certain named person "did sell *or* give away" certain liquors on a Sunday, is insufficient. People v. Schatz, (1900) 50 App. Div. 544, 64 N. Y. S. 127.

Information and belief.—An information before a magistrate made upon information and belief by a special excise agent, is insufficient to confer jurisdiction to subpoena witnesses, and a writ of prohibition may be issued. People v. Tuthill, (1902) 2 Liq. Tax Law Rep. 636.

Voluntary appearance of witnesses.—Though an original information placed before a magistrate is insufficient to authorize him to subpoena witnesses, if witnesses voluntarily appear and make depositions before him he may have sufficient before him to authorize him to issue a warrant. People v. Ford, (1902) 2 Liq. Tax Law Rep. 609.

Appeal.—An appeal is not justified or allowable to review the action of a magistrate in holding one for the grand jury, who is alleged to have sold intoxicating liquors to a minor under the age of sixteen years. People v. Hedden, (1899) 2 Liq. Tax Law Rep. 32.

Subsequent city charter giving police court greater powers.—The provisions of this section providing that certain violations shall be prosecuted by indictment, will not ordinarly be deemed repealed by a subsequent city charter purporting to give the police court of such city exclusive jurisdiction in the first instance to try persons charged with misdemeanors in such city. People v. Craig, (1908) 60 Misc. 300, 111 N. Y. S. 909, affirmed 128 App. Div. 908, 112 N. Y. S. 1142, wherein it was said: "The Liquor Tax Law has proven itself in many ways to be a very beneficent statute; but if, by enacting charters for cities and villages and giving exclusive jurisdiction in cases of misdemeanors to the police courts of such localities, the authority to punish for violations of the Liquor Tax Law can thus be limited to less than one-half of the maximum punishment prescribed by law, it can readily be seen that it would make a farce of that statute, and offenders in localities where experience shows the law is most frequently violated, to wit, in large cities, would upon conviction be apt to receive much less punishment than similar offenders in rural districts. I do not believe that the Legislature intended any such chopping to pieces and destroying the terms and effect of the Liquor Tax Law."

Further prosecution after discharge by magistrate.—A discharge by a magistrate does not bar a further prosecution for the same offense, but the accused cannot be proceeded against in a Court of Special Sessions. People v. Dillon, (1910) 197 N. Y. 254, 90 N. E. 820, 18 Ann. Cas. 552.

New York county.—After the annexation of certain parts of Westchester County to the city and county of New York by chapter 934 of the Laws of 1895, it was held that the grand jury and the courts of New York county had jurisdiction of violations of the Liquor Tax Law committed within the district so annexed. People v. Boudouin, (1897) 19 Misc. 665, 44 N. Y. S. 1055.

Expenses of prosecutions.—The expense of a prosecution for an offense

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within the jurisdiction of a Court of Special Sessions, is a town charge; the expense of other prosecutions is a county charge. Op. Atty.-Gen. (1902) 342.

Cited.—This section was cited in People v. Manganaro, (1912) 76 Misc. 293, 137 N. Y. S. 82.

§ 38. Jurisdiction of courts of special sessions in the city and county of New York. After a person has been held to bail or committed to the keeper of the city prison by a magistrate, upon a complaint for a violation of any of the provisions of this chapter in the city and county of New York, as provided in section thirty, all further and subsequent proceedings instituted for the purposes mentioned in section thirty-seven of this chapter shall be prosecuted in the court of special sessions in and for said city and county in the manner prescribed by law for the trial and misdemeanors committed therein. Upon the conviction in such court of special sessions of any person charged with a violation of any of the provisions of this chapter, judgment shall be pronounced by the said court pursuant to the provisions of this chapter, and all fines imposed shall be collected and paid over to the special deputy commissioner of the county to be apportioned and disposed of as provided by section ten.

This section was derived from the Liquor Tax Law of 1896, § 35a, as added by L. 1897, ch. 312, § 25.

Section 38 of the Liquor Tax Law of 1896 is now covered by section 41.

Jury trial in Court of Special Sessions in New York city.—A saloon keeper charged with a misdemeanor in the illegal sale of liquor and held for trial in the Court of Special Sessions of New York City, is not entitled to a jury trial. People v. Wolf, (1898) 24 Misc. 94, 53 N. Y. S. 296. See infra, this note, par. *Transfer to General Sessions.*

Sunday sale.—A person convicted in the Court of Special Sessions in New York City of selling liquor on Sunday forfeits his certificate, though he has no right to appeal from the judgment of conviction. Dornhoefer v. Farley, (1914) 161 App. Div. 600, 146 N. Y. S. 891.

Jurisdiction.—The Court of Special Sessions of New York county has power to try one accused of a violation of any provision of section 30. People v. Bagley, (1903) 41 Misc. 97, 83 N. Y. S. 766.

Transfer to General Sessions.—This section giving the court of Special Sessions in New York City jurisdiction of certain offenses is not intended to deprive an accused of a jury trial, and his case may be transferred to the Court of General Sessions, as in the case of prosecutions for other misdemeanors. People v. Gerard, (1897) 1 Liq. Tax Law Rep. 183; People v. Seaman, (1898) 1 Liq. Tax Law Rep. 335.

The transfer of a case to the Court of General Sessions for prosecution by indictment will not generally be ordered, except where exceptional features render a jury trial proper or where a fair trial cannot be had at Special Sessions. People v. Wade, (1899) 26 Misc. 585, 57 N. Y. S. 645; People v. Levy, (1898) 24 Misc. 469, 63 N. Y. S. 643; People v. Wolf, (1903) 3 Liq. Tax Law Rep. 194. Where it does not appear that the rights of defendant are prejudiced or endangered or that a fair and impartial administration of justice cannot be had in the Court of Special Sessions, the Court of General Sessions may deny an application for the transfer of the prosecution. People v. Barnett, (1901) 2 Liq. Tax Law Rep. 504.

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In a prosecution of a certificate holder for a violation of the law, which would result in the forfeiture of his certificate in the event of conviction, it is reasonable that the charge be prosecuted by indictment, and the case will be transferred; but the transfer may be denied in a prosecution of an employee of the certificate holder. People v. Cornyn, (1901) 36 Misc. 135, 72 N. Y. S. 1088. But where there has already been one conviction of an employee, the second conviction under section 36 carries with it a forfeiture of the certificate, and hence the second prosecution may properly be transferred to the General Sessions. People v. Gantz, (1903) 41 Misc. 542, 85 N. Y. S. 79; People v. Hoenig, (1904) 86 N. Y. S. 673.

§ 39. Collection of fines and penalties and forfeitures of bonds; reports of county clerks. Upon conviction of any person, whether as officer of a corporation or as member of a copartnership, or as an individual, for keeping a disorderly house, in violation of section eleven hundred and forty-six of the penal law, or in violation of any municipal ordinance prescribing the same or any similar offense, and upon conviction of any such person for any offense prescribed in article eighty-eight or one hundred thirty of the penal law, or for the same or any similar offense prescribed in any municipal ordinance, and upon conviction of any such person for any felony whatsoever, the court or officer before whom such conviction shall have been had, or the clerk of the court if there be a clerk, shall forthwith make and file in the office of the clerk of the county in which such conviction shall have been had a certified statement of such conviction and the sentence, if any, to be reported to the state commissioner of excise by said county clerk, as hereinafter provided in the case of convictions for violations of this chapter. Upon conviction of any person whether as officer of a corporation or as member of a copartnership or as an individual, for a violation of the provisions of this chapter, the penalty for which is prescribed in section twenty-seven, twenty-eight or thirty-six hereof, the court or officer before whom such conviction shall have been had, or the clerk of the court if there be a clerk, shall forthwith make and file in the office of the clerk of the county in which such conviction shall have been had a certified statement of such conviction and the sentence, if any; and the clerk of said county shall immediately thereupon enter in the docket book, kept by said clerk for the docketing of judgments in said office, the amount of the penalty or fine imposed, as a judgment against the person so convicted or sentenced, and in favor of the state commissioner of excise, and said county clerk shall also enter in the docket of

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said judgment a brief statement setting forth the fact that said judgment is for a fine or penalty imposed for a violation of the "liquor tax law," and said county clerk shall immediately mail or deliver to the state commissioner of excise a duly certified transcript of said judgment. If the fine imposed be paid into court or to any officer, the said officer or clerk of the court shall at once pay the same to the county treasurer or special deputy commissioner of the county or borough, who shall give his receipt therefor, and shall at once notify the state commissioner of excise of the payment of such judgment, who shall thereupon execute a satisfaction thereof and forward the same to the said county treasurer or special deputy commissioner, to be delivered to the judgment debtor. If said judgment shall not be paid within five days after such conviction and sentence, the clerk of said county shall issue an execution against the property of such judgment debtor or debtors, against whom said judgment is docketed, directed to the sheriff of the county, and at once deliver the said execution to the said sheriff, who shall forthwith proceed to collect the amount due on said judgment, together with his legal fees and costs by levy and sale, in the manner now provided by law for the collection of executions against property, of any goods, chattels, furniture, fixtures and leasehold interest, or other property of such judgment debtor or debtors, wherever found. Such levy shall take precedence over any and all liens, mortgages, conveyances or incumbrances taken or had on such property, subsequent to the docketing of said judgment in said clerk's office, and no property of said judgment debtor or debtors shall be exempt from such levy and sale. All moneys collected upon execution under the provisions of this section shall be paid by the officer collecting the same, less his legal fees and costs thereon, to such county treasurer or special deputy commissioner who shall apportion and account for the same as provided by this chapter. In case said judgment debtor or debtors shall have given the bond provided for in section sixteen of this chapter, the state commissioner of excise may forthwith proceed to collect from the sureties thereon the amount of such judgment, together with the costs of collection, by due process of law, and the issuing of an execution under the provisions of this chapter shall not be a condition precedent to the enforcement of the provisions and penalties of any bond given by such judgment debtor or debtors

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pursuant to the provisions of this chapter. At the end of each month every county clerk shall make under his hand and official seal and forward to the state commissioner of excise a written report of all orders or judgments filed or entered in his office during such month in favor of or against the state commissioner of excise, and also a report of all orders or judgments entered in said office in favor of or against any person illegally trafficking in liquor or the holder of a liquor tax certificate in any proceeding or action instituted or brought for the purpose of compelling the surrender and cancellation of a liquor tax certificate, or in favor of or against any county treasurer or special deputy commissioner on account of his having issued or transferred or refused to issue or transfer any liquor tax certificate. Such report shall contain the title of the action or proceeding in which each of said orders or judgments was obtained, the date of each order or judgment, also when filed and entered; and also the substance or purport of such order or judgment; also all indictments for violations of this chapter, and all judgments of convictions thereon. Such report shall state the date when each indictment was found, the name of the defendant, the time and place when and where the crime was committed, and the particular offense charged; and in case of a conviction shall state the name of the defendant, the date of the conviction and the judgment pronounced thereon, and if the fine imposed shall have been paid in court a statement of that fact. All sealed indictments shall be included in the first report made by such county clerk after the defendant therein shall have been arrested or admitted to bail. Said county clerk shall also furnish a complete certified copy of any such order, indictment, judgment or record upon the request of the state commissioner of excise. The fees or compensation of such clerk for making such report and for making and furnishing a certified copy of any such order, judgment, indictment or record, at the request of the state commissioner of excise, and any other fee which said clerk or the sheriff of any county would be by law entitled to receive from the state commissioner of excise shall be legal charges against the county in which the office of the said clerk or sheriff is situated, and shall be audited and paid as are other lawful claims.

This section was derived from the Liquor Tax Law of 1896, § 36, as amended by L. 1897, ch. 312, § 26; L. 1903, ch. 486, § 16; L. 1905, ch. 680, § 5, and L. 1908, ch. 350, § 18.

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Section 39 of the Liquor Tax Law of 1896 is now covered by section 42.

Judgment to pay fine and remission thereof: see Code Crim. Pro., § 484. *Imprisonment until payment of fine:* see Code Crim. Pro., § 718.

Fees of clerk.— It is the duty of the county clerk, as clerk of the court, to enter an order at the request of the commissioner of excise without charge, but by this section he is entitled to a fee of twenty-five cents for furnishing a certified copy thereof, the same to be a county charge. People v. Howard, (1912) 152 App. Div. 621, 137 N. Y. S. 496.

Prosecution under section 1146 of Penal Law.—Where a defendant pleads guilty to an indictment for a violation of section 1146 of the Penal Law, the judgment of conviction should not be entered in favor of the commissioner of excise, but in favor of the people; if erroneously entered by the court it may be corrected on motion. People v. Manganaro, (1912) 76 Misc. 293, 137 N. Y. S. 82.

Liability of surety on bail bond given pending appeal.— Where one convicted of a violation of the Liquor Tax Law procures a certificate of reasonable doubt and appeals from the judgment of conviction, being admitted to bail on giving an undertaking, if the judgment of conviction is affirmed the surety is liable on the bond for the fine imposed on the defendant, though he surrenders himself in execution of the judgment of conviction. People v. Connolly, (1903) 88 App. Div. 302, 84 N. Y. S. 617.

Cited.— Mudge v. West End Brewing Co., (1910) 68 Misc. 362, 125 N. Y. S. 15.

§ 40. Duties of public officers in relation to complaints and prosecutions under this chapter. It shall be the duty of every sheriff, deputy sheriff, police officer or constable, having notice or knowledge of any violation of the provisions of this chapter, to immediately notify the district attorney of the county in which such violation occurs, by a statement under oath of the facts of such violation, and it shall be the duty of such district attorney when complaint on oath is made of such violation, forthwith to cause the arrest and attend the examination personally or by an assistant, of each person so complained of, unless a term of court with a grand jury in attendance shall be appointed to be held in such county within ten days from the time of the receipt by the district attorney of such verified complaint, or unless such accused persons shall have been examined upon such charge and admitted to bail or committed thereon. It shall be the duty of the district attorney to prepare and present to the grand jury of the county all evidence tending to show a violation in each case within his knowledge, or reported to him pursuant to the provisions of this section, or reported to him by the verified complaint of any reputable citizen, except that said district attorney shall prosecute such violations as are specified in subdivision two of section thirty-seven in the court of special sessions having jurisdiction thereof and the said district attorney shall prosecute any person violating

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any of the provisions of this chapter and for each and every violation thereof. Within five days after the discharge of any grand jury, the district attorney shall file in the office of the clerk of the county a certified statement giving the name and residence of each person charged with a violation of this chapter, which charge shall have been investigated and dismissed by such grand jury, and also giving the name and residence of each witness examined in the investigation of each such charge. All officers authorized to make arrests in any city, town or village, and the special agents appointed under section seven of this chapter may in the performance of their duties enter upon any premises where the traffic in liquors is carried on or liquors are exposed for sale at any time when such premises are open, except that places occupied by membership corporations incorporated prior to the twenty-third day of March, eighteen hundred and ninety-six, which traffic in liquors solely with the members therof shall not be entered for inspection by any officer unless such entry and inspection is expressly authorized and directed by the state commissioner of excise by written instructions.

This section was derived from the Liquor Tax Law of 1896, § 37, as amended by L. 1897, ch. 312, § 27; L. 1900, ch. 367, § 12, and L. 1903, ch. 486, § 17.

Section 40 of the Liquor Tax Law of 1896 is now covered by Penal Law, §§ 1221, 1912.

Inspection of hotels: see supra, § 32.

Right of private citizen to maintain action to enforce Liquor Law: see 15 Ann. Cas. 1015, note; 14 L. R. A. (N. S.) 1156, note.

Consent to dismissal of indictment.— The requirement in this section that a district attorney shall prosecute persons for violations of the Liquor Tax Law, does not prohibit the dismissal of an indictment by consent of the district attorney under section 671 of the Code of Criminal Procedure. People v. Kurminsky, (1898) 23 Misc. 504, 52 N. Y. S. 609, wherein it was said: "The requirement of section 37 [now section 40] is the performance by the district attorney of the duty of prosecution whenever there is fair reason to believe, from the evidence at command, or which by diligence may be obtained, that a conviction can be, or, if properly weighed, ought to be had; and the penalty imposed by section 38 [now section 41] is for a wilful or corrupt disregard of this duty, or, at most, a careless neglect to perform it. But where a diligent and honest investigation discloses an utter want of necessary proof, or if for any other reason in the intelligent and honest discharge of his duty the district attorney becomes satisfied that a conviction cannot be had, he may avail himself of the provisions of section 671, and recommend a dismissal without thereby exposing himself to any penalty whatever." And see to the same effect Op. Atty.-Gen. (1897) 321.

Submission to grand jury of case dismissed by magistrate.— The district attorney, after a magistrate has dismissed a prosecution under section 37, is not bound by this section to present the case to the grand jury. Op. Atty.-Gen. (1897) 199.

Information by police officer.— The provisions of this section requiring police officers to report violations of the law to the district attorney, do not

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preclude them from laying an information before a magistrate under section 37. People v. Schatz, (1900) 50 App. Div. 544, 64 N. Y. S. 127.

Inspection by police officers.— Police officers in cities have the right to enter and inspect premises where liquor is sold, and such rights are not confined to the room where the sale of liquor is actually carried on, but extends to any portion of the building connected therewith. Mehler v. Baker, (1910) 68 Misc. 442, 125 N. Y. S. 22.

Resistance to officer making inspection.— One who resists the entry of the police officer into parts of the premises where he is allowed to make an inspection under this section, is guilty of resisting a public officer. People v. Miller, (1902) 79 N. Y. S. 1122.

Entry into lower room fastened with hook.— The word "premises" as used in this section in connection with the right of entry by police officers, refers to any and all places connected with the building over which the seller of liquor has the right to and does exercise authority and control, and thus includes a lower room which is fastened with a hook. People v. Miller, (1902) 79 N. Y. S. 1122.

Stationing police officer in premises.— This section giving a right to inspect premises where liquors are sold, does not authorize the continuous occupation of the premises by an officer. Hale v. Burns, (1905) 101 App. Div. 101, 91 N. Y. S. 929.

Right of officers to tell that premises are disorderly.—An injunction will not issue to restrain a police captain in the city of New York from stationing police officers before liquor premises, or from interfering with customers of the premises by telling them that the premises are disorderly and liable to be raided at any time and the occupants arrested. Delaney v. Flood, (1906) 183 N. Y. 323, 76 N. E. 209, 111 A. S. R. 759, 5 Ann. Cas. 480, 2 L. R. A. (N. S.) 678, *reversing* 45 Misc. 97, 91 N. Y. S. 672. See also Hertz v. McDermott, (1904) 45 Misc. 28, 90 N. Y. S. 803.

§ 41. Penalties for neglect of public officers to perform their duty under this chapter. Any officer who shall neglect or refuse to perform his duty under the provisions of this chapter, shall be liable to a penalty of five hundred dollars for each and every offense, and if such officer be a county treasurer or district attorney, he shall be removed from office by the governor after hearing and determination thereon and decision that such neglect or refusal has occurred. Any citizen may prefer charges to the governor under this section.

This section was derived from the Liquor Tax Law of 1896, § 38.

Section 41 of the Liquor Tax Law of 1896 is now covered by Penal Law, § 1913.

Neglect or omission of duty by public officer: see PENAL LAW, §§ 1841, 1857. *False statement by special deputy commissioner or county treasurer:* see supra, § 12, subd. 17.

Mandamus to compel public officials to enforce the Liquor Law: see 28 L. R. A. (N. S.) 246, note.

Rule of construction.— This section is highly penal and is to be construed with great strictness. People v. Kurminsky, (1898) 23 Misc. 504, 52 N. Y. S. 609.

Dismissal of an indictment.—A district attorney may consent to the dismissal of an indictment for a violation of the Liquor Tax Law without rendering himself liable for the penalty provided in this section, if he believes

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in the impossibility of a conviction on the merits. People v. Kurminsky, (1898) 23 Misc. 504, 52 N. Y. S. 609. And see supra, § 40, as to the duties of district attorneys. See also supra, § 40, note.

§ 42. Recovery of damages in a civil action. A recovery may be had in a civil action of the damages suffered by reason of the intoxication of any person, from any corporation, association, copartnership or person who shall by selling or giving away liquors have caused such intoxication, if the person or one of the persons suffering such damage shall, previous to such selling or giving away, have given written notice to such corporation, association, copartnership or person, or to their agents or employees, or to the person so selling or giving away, forbidding such selling or giving away liquors to the person whose intoxication shall have caused such damage; or such damage may be recovered from any corporation, association, copartnership or person owning or renting or permitting the occupation of any building or premises where such selling or giving away of liquors shall have occurred, jointly with the corporation, association, copartnership or person selling or giving away, or severally when the notice herein provided for shall have been given to such owners or their authorized agents, and not otherwise.

This section was derived from the Liquor Tax Law of 1896, § 39.

Section 42 of the Liquor Tax Law of 1896 is now covered by section 43.

Right of action in the absence of a civil damage act for injury or death following unlawful sale of liquor: see 44 L. R. A. (N. S.) 299 note; 34 L. R. A. (N. S.) 1036.

Liability for sale to husband: see the following notes: 40 L. R. A. (N. S.) 360, 7 L. R. A. 300, 4 L. R. A. 495. *Competency of wife to testify as to misconduct of husband in action under civil damage act:* see 39 L. R. A. (N. S.) 316 note.

Necessity, in order to support a recovery under civil damage act, that the intoxication be the proximate cause of the injury: see 50 L. R. A. (N. S.) 858, note, 13 L. R. A. (N. S.) 1158.

Measure of damages for death caused by sale of intoxicating liquor: see 3 L. R. A. 327 note.

Liability of sureties under civil damage act where sales causing injury were not confined to the period covered by their bonds: see 25 L. R. A. (N. S.) 585 note.

Common law rule.—"The Legislature, in authorizing the recovery of damages in a civil action, under the Liquor Tax Law, created a cause of action for the protection of the dependent and helpless which was unknown at the common law. . . . The right to maintain such an action cannot be extended beyond the terms of the statute construed in view of the evil to be remedied and the object to be attained. Westbrook v. Miller, (1904) 98 App. Div. 590, 90 N. Y. S. 558.

Notice to defendant.— The Civil Damage Act of 1873 was radically different from the present act and permitted the recovery of damages though no notice was served on the defendant forbidding the sale. The present law was enacted in 1892, but it was held that it did not abrogate a cause of action which

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arose prior to 1892. Quinlan v. Welch, (1894) 141 N. Y. 158, 36 N. E. 12. Under the statute now in force, it is necessary that a notice be given to the defendant forbidding the sale, and this rule applies to a sale made in a town which has voted against the issuance of certificates. Snyder v. Launt, (1896) 1 App. Div. 142, 37 N. Y. S. 408.

Landlord.— This section renders the landlord of premises liable for civil damages in certain cases for the abuse of the law by the tenant. Nostrand v. Hughes, (1900) 54 App. Div. 602, 67 N. Y. S. 72. The constitutionality of such a provision in the Civil Damage Act of 1873 was upheld in Berthoff v. O'Reilly, (1878) 74 N. Y. 509, 30 Am. Rep. 323, wherein it was said: "The right of the State to regulate the traffic in intoxicating liquors, within its limits, has been exercised from the foundation of the government, and is not open to question. The State may prescribe the persons by whom and the conditions under which the traffic may be carried on. It may impose upon those who act under its license such liabilities and penalties as in its judgment are proper to secure society against the dangers of the traffic and individuals against injuries committed by intoxicated persons under the influence of or resulting from their intoxication."

Sales to minor.— The fact that sales of liquor were wrongfully made to a minor does not give his parent a cause of action under this section, unless the circumstances are such that the plaintiff has sustained legal damages on account of the sale. Westbrook v. Miller, (1904) 98 App. Div. 590, 90 N. Y. S. 558.

Complaint.— A complaint, which does not allege or claim that the plaintiff has suffered damage by reason of the intoxication of the plaintiff's son, is insufficient to constitute a cause of action under this section. Westbrook v. Miller, (1904) 98 App. Div. 590, 90 N. Y. S. 558.

Liquor received elsewhere.— One selling liquor may be liable under the statute if the sale contributed to the damages sustained by the plaintiff, and it is not important that the intoxicated person received liquor elsewhere than at the defendant's premises at about the same time. Lawson v. Eggleston, (1898) 28 App. Div. 52, 52 N. Y. S. 181, affirmed (1900) 164 N. Y. 600 mem.

§ 43. Penalties; actions to recover. Any corporation, association, copartnership or person who shall traffic in liquor contrary to the provisions of this chapter or who shall make a false statement upon application for a liquor tax certificate, or upon application for the transfer or surrender and cancellation thereof, or who shall violate any of the provisions of sections eight, ten, nineteen, twenty, twenty-one, twenty-three, twenty-four, twenty-five, twenty-six,[1] twenty-seven, twenty-eight, twenty-nine, thirty, thirty-four, thirty-seven, thirty-nine, or forty of said chapter, in addition to the punishment and penalties in this chapter otherwise imposed and provided, shall be liable to a penalty of fifty dollars for each and every violation, to be recovered by the state commissioner of excise in an action brought in his name as such com-

[1] In the original bill, as introduced in the legislature, the reference to section twenty-six was omitted. However, in course of passage, this reference was restored and § 43 was left unamended, and appears here in unamended form.

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missioner, in any court of record in any county of the state, provided that two or more penalties may be sued for and recovered in the same action; and if such corporation, association, copartnership or person be the holder of a liquor tax certificate, such certificate shall be forfeited. When an action is brought in any county other than the county wherein the defendant resides, or in an adjoining county, the place of trial of such action may be changed to any county adjoining the county wherein the defendant resides, for cause shown as provided by the code of civil procedure. If judgment be recovered against the holder of a liquor tax certificate in any action for penalties, such judgment shall provide, in addition to the penalties included therein, that such certificate and all rights thereunder of the holder thereof, including all rebate moneys upon cancellation, be forfeited, and that the defendant, or any person having such certificate in his possession or under his control, shall surrender said certificate to the officer who issued the same or to his successor in office, immediately upon the service of a certified copy of said judgment; and neglect or refusal of any person to surrender said certificate in pursuance of the provisions of any such judgment shall be a contempt of court, punishable in the manner provided by the judiciary law. All moneys recovered in any such action or actions shall be paid over and accounted for in the same manner as are moneys collected under subdivision four of section eight of this chapter. The state commissioner of excise may also in like manner bring an action in his name as such commissioner to recover the penalty provided for by section forty-one of this chapter and the provisions of this section shall apply to the commencement and prosecution of such action and the disposition of all moneys recovered as penalties therein.

This section was derived from the Liquor Tax Law of 1896, § 42, as amended by L. 1897, ch. 312, § 29. Laws 1910, ch. 503, § 6 purports to amend this section but no change was effected by that act. See footnote.

Section 43 of the Liquor Tax Law of 1896, "Distribution of copies of this act by the secretary of state," was not consolidated in the Liquor Tax Law of 1909.

Action for penalty for violation of intoxicating liquor statute: see Ann. Cas. 1916E 868 note.

Failure to receive certificate.— If for any reason the county treasurer fails to issue a certificate, the remedy of the applicant is for a writ of certiorari under section 27; if the applicant traffics in liquor without the certificate, he is liable for the penalties prescribed by this section. Clement v. Smith, (1908) 60 Misc. 595, 112 N. Y. S. 955.

Violation by agent.— In an action to recover a penalty for an illegal sale

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of liquors, evidence that the sale was made by an agent of the party sought to be charged is *prima facie* sufficient. Amerman v. Kall, (1884) 34 Hun 126. An action under the Revised Statutes for a penalty for an illegal sale of liquor, could be maintained where the sale was by an agent; and each sale rendered the defendant liable for the penalty, the penalties being cumulative in the case of more than one sale. Hall v. McKechnie, (1856) 22 Barb. 244.

Change of venue.— The provision in this section relative to changing the venue to a county adjoining the one where the defendant resides, denies the defendant the right, when the venue is laid in an adjoining county, to move to have the place of trial changed to the county where he resides; but he may, in case the action is not brought in a county adjoining the county of residence, move to have the place of trial changed to some one of the adjoining counties, but not to his own county. Lyman v. Matty, (1898) 35 App. Div. 227, 54 N. Y. S. 765.

Municipal ordinances.— The attorney-general has expressed the opinion that village trustees may pass an ordinance imposing a penalty on one selling liquors in such village contrary to the Liquor Tax Law, but that they cannot prescribe that a violation of the ordinance shall constitute disorderly conduct. Op. Atty.-Gen. (1903) 310.

Indictment as bar to penalty.— An indictment under the Revised Statutes for an illegal sale of liquor without a license, was held to be no bar to the prosecution of an action for a penalty given by such law for the same violation. Blatchley v. Moser, (1836) 15 Wend. 215; Austin v. Carswell, (1893) 67 Hun 579, 22 N. Y. S. 478.

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ARTICLE 3

Laws Repealed; When to Take Effect

Section 60. Laws, grants and charters repealed.
61. When to take effect.

§ 60. Laws, grants and charters repealed. The provisions of any special or local law, grant or charter in conflict with this chapter are hereby repealed and annulled. Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed, but the provisions of any such relating to the transfer, cancellation or revocation of a license, the collection of penalties or prosecutions for the violation of the law shall continue in force as to any license, which has not expired at the time this chapter takes effect, until the expiration thereof, subject to the provisions of his chapter in relation to the performance of the duties of boards of excise or excise commissioners by special deputies or special agents designated by the state commissioner of excise.

This section was derived from the Liquor Tax Law, § 44.

Municipal ordinance.— The Liquor Tax Law of 1896 in prescribing the hours that the traffic in liquor could be carried on, operated as a repeal of municipal ordinances prescribing different hours. People v. Weir, (1896) 1 Liq. Tax Law Rep. 101.

§ 61. When to take effect. This chapter shall take effect immediately.

Schedule of Laws Repealed.

Revised Statutes.... Part 1, chapter 20, title 4,.....All
Revised Statutes.... Part 1, chapter 20, title 8 section 72
Revised Statutes.... Part 1, chapter 20, title 9, ...All

Laws of	Chapter	Section
1779.....	17.....	All (2d Sess.)
1779.....	18.....	All (2d Sess.)
1780.....	40.....	All (3d Sess.)
1781.....	27.....	All (4th Sess.)
1781.....	52.....	2 (4th Sess.)
1783.....	22.....	1–5 (6th Sess.)
1784.....	37.....	All (7th Sess.)

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Laws of	Chapter	Section
1788	48	1–11, 13–22 (11th Sess.)
1799	78	All
1801	34	3
1801	147	3, 4
1801	164	All
1816	210	2
1821	203	2
1822	135	1
1824	238	27
1828	20	15, ¶¶ 23, 24 (2d Meet.)
1828	21	1 ¶¶ 65, 70, 350 (2d Meet.)
1835	272	All
1840	229	All
1842	157	3, 4
1843	97	All
1845	70	4
1845	300	All
1846	14	All
1846	278	All
1847	274	All
1854	285	All
1855	231	All
1857	628	All
1858	143	All
1859	494	All
1860	274	All
1862	161	All
1866	578	All
1868	10	All
1869	856	All
1870	175	All
1872	143	All
1873	249	All
1873	549	All
1873	646	All
1873	820	All
1874	327	All
1874	444	All
1874	642	All
1876	48	All

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Laws of	Chapter	Section
1877.....	419.....	All
1877.....	420.....	All
1878.....	109.....	All
1879.....	145.....	All
1879.....	472.....	All
1880.....	429.....	All
1881.....	164.....	All
1881.....	466.....	All
1882.....	126.....	All
1883.....	340.....	All
1885.....	323.....	All
1885.....	444.....	All
1886.....	459.....	All
1886.....	496.....	All
1887.....	679.....	All
1888.....	35.....	All
1890.....	161.....	All
1890.....	163.....	All
1892.....	265.....	All
1892.....	360.....	All
1892.....	401.....	All
1892.....	402.....	All
1892.....	403.....	All
1892.....	404.....	All
1893.....	143.....	All
1893.....	221.....	All
1893.....	271.....	All
1893.....	479.....	All
1893.....	480.....	All
1893.....	481.....	All
1894.....	294.....	All
1894.....	720.....	All
1895.....	774.....	All
1895.....	811.....	All
1896.....	112.....	All, except §§ 40, 41
1896.....	445.....	All
1897.....	83.....	All
1897.....	312.....	1–24; 25, subds. 1. 2, part following the words "and also"; 26, 27, 29, 30.

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Laws of	Chapter	Section
1897.....	442.....	All
1897.....	775.....	All
1898.....	167.....	All
1898.....	497.....	1, part adding § 7 to L. 1897, Ch. 439, 2
1899.....	398.....	All
1899.....	434.....	All
1900.....	80.....	All
1900.....	257.....	All
1900.....	367.....	All
1901.....	640.....	All
1903.....	115.....	All
1903.....	486.....	All
1904.....	205.....	All
1904.....	348.....	All
1904.....	485.....	All
1905.....	104.....	All
1905.....	677.....	All
1905.....	679.....	All
1905.....	680.....	All
1905.....	697.....	All
1905.....	698.....	All
1906.....	183.....	All
1906.....	272.....	All
1907.....	345.....	All
1907.....	460.....	All
1908.....	46.....	All
1908.....	63.....	All
1908.....	144.....	All
1908.....	350.....	All

NOTES TO SCHEDULE OF REPEALS

Prepared by the Board of Statutory Consolidation and printed in their report of 1907, at page 3509.]

R. S., Pt. 1, Ch. 20, Tit. 4. Sections 1 to 11, inclusive, of Pt. 1, Ch. 20, Tit. 4, of the Revised Statutes are repealed for the reason that they are superseded by the provisions of §§ 29 and 35 of the Liquor Tax Law.

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The provisions of the Revised Statutes referred to provide that the overseer of the poor of any city or town may give a notice that a person is an habitual drunkard, impose a penalty for not observing the notice and outline proceedings for the determination of the question as to whether or not the person concerning whom the notice was given is an habitual drunkard. All and more than is provided in the Revised Statutes can be accomplished under sections of the Liquor Tax Law referred to.

Section 29 of the Liquor Tax Law contains a prohibition not only against selling, delivering or giving away liquors to an habitual drunkard but to any person concerning whom a notice may be given, as provided in subdivision 5. The notice concerning an habitual drunkard under section 29 of the Liquor Tax Law may be given by any person and the notice provided for in subdivision 5 may be given by the overseer of the poor of a town, provided the person concerning whom the notice is given is wholly or partly a charge upon the town, and by the mayor or chief of police of a city with respect to a person who has been convicted of a felony or misdemeanor five or more times.

Thus it will be seen that the Liquor Tax Law provides for a notice not only concerning habitual drunkards but concerning other persons not covered by the provisions of the Revised Statutes. While a portion of the provisions of the Revised Statutes relates to the overseer of the poor of a city, the Liquor Tax Law abrogates these provisions by requiring the notice to be given by the mayor or chief of police of a city.

There is no express provision in the Liquor Tax Law with reference to the giving of notice except under subdivision 5 of section 29, and any person not merely the overseer of the poor may give a notice under the section which will be just as effectual as any notice provided for in the Revised Statutes, for section 35 contains the provisions for a violation of the Liquor Tax Law and in any prosecutions under this provision the question of whether or not the person concerning whom the notice was given is an habitual drunkard can be determined where that question is at issue.

It follows, therefore, that all that could be accomplished by the Revised Statutes can now be secured under the Liquor Tax Law and the former provisions having been superseded by the latter are recommended for repeal.

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L. 1779, Ch. 17, 2d Sess. Expired by limitation, March 1, 1780.

L. 1780, Ch. 40, 3d Sess. Expired by limitation, March 1, 1781.

L. 1781, Ch. 27, 4th Sess. Expired by limitation, March 1, 1788.

L. 1783, Ch. 22, 6th Sess. Amendatory of L. 1781, Ch. 27, which expired by limitation, March 1, 1788.

L. 1784, Ch. 37, 7th Sess. Amendatory of L. 1781, Ch. 27, which expired by limitation, March 1, 1788.

L. 1828, Ch. 20, § 15, ¶¶ 23, 24, 2d Meet. Sections added to Revised Statutes by statute cited for repeal are repealed.

L. 1854, Ch. 285. Inoperative. Obsolete. R. S., Pt. 1, Ch. 20, Tit. 9, to which it applies is repealed.

L. 1879, Ch. 145. L. 1870, Ch. 175, § 2, was amended by L. 1873, Ch. 549, § 1, and L. 1874, Ch. 642, § 1, both of which added new matter and as so amended said act was amended "to read as follows" by L. 1879, Ch. 145, § 1.

L. 1890, Ch. 163. Consolidated in Liquor Tax Law, § 22. Section 3 held unconstitutional, People ex rel. Bishop v. Palen, 74 Hun, 289. Section 4, when to take effect.

L. 1895, Ch. 774. The schedule of laws repealed in the Liquor Tax Law contained L. 1895, Ch. 744, an act entitled "An act to repeal * * * an act to authorize and provide for * * * sewer * * *" It was held in 63 A. D. 553 that said Ch. 744 was not intended for repeal, and there is no doubt that Ch. 774, relating to sale of liquors and cigars by excise commissioners was intended, the error arising from a typographical insertion of a 4 for a 7.

L. 1896, Ch. 112. This statute, which is the "old" Liquor Tax Law, is recommended for repeal because its live provisions have been consolidated in the Liquor Tax Law, except as follows:

Section 3, which provides that all boards of excise, together with their powers and duties, are abolished after April 30, 1896, and that after the passage of the Liquor Tax Law no licenses should be granted by such boards of excise to extend beyond that date. Omitted as temporary.

Section 4, which provides that licenses in effect when Liquor Tax Law went into effect should terminate on June 30, 1896, and

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how the holders of such licenses should be reimbursed for the license fee paid therefor. Omitted as temporary.

Section 5, which provides that the boards of excise in existence should on April 15, 1896, make a report of all licenses in existence and on April 30, 1896, make a supplemental report and surrender their books and records. Omitted as temporary.

Section 40, which makes public intoxication a misdemeanor and prescribes a penalty therefor, has been transferred to the Penal Law, §§ 1201, 1892.

Section 41, which makes the employment of persons addicted to the use of intoxicants by certain common carriers a misdemeanor and prescribes a penalty therefor, has been transferred to the Penal Law, § 1893.

Section 43, which provides for the distribution of copies of the Liquor Tax Law "immediately upon this act becoming a law," but does not provide for any future distribution, has been omitted as temporary.

L. 1897, Ch. 83. Statute cited authorizes the auditing officers of cities to audit and allow within thirty days of the passage of the statute claims arising on licenses granted by the city which were abrogated by the going into effect of the Liquor Tax Law. In event of claims not being presented within the thirty days specified, then claim to be audited and allowed in same manner and within same time as any other claim against the city. The act is temporary and does not give or take away any rights after the expiration of thirty days after March 22, 1897.

L. 1897, Ch. 312. Sections 1–11, 13, 15–17, 19, 21, pt., 22, 24, 26, 27 have been repealed as appears in schedule. Sections 12, 14, 18, 20, 21, pt., 23, 25, 29 have been consolidated in Liquor Tax Law in §§ 17, 20, 26, 28, 29, 33, 36, 37 and 42, respectively. Section 28, which amends L. 1896, Ch. 112, § 40, has been transferred to Penal Law.

L. 1897, Ch. 775. Consolidated in Liquor Tax Law, § 14, because, while referring to a restricted locality, it is, in effect, an exception to § 14.

L. 1898, Ch. 497, § 1, pt. Section 1, so far as it added to L. 1897, Ch. 439, a new § 7, consolidated in Liquor Tax Law, § 14, for the same reason as preceding statute.

L. 1899, Ch. 434. Section 1 has been constructively repealed as

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appears in the schedule. Section 2 repeals inconsistent statutes, and § 3 is when to take effect.

L. 1900, Ch. 257. Section 1 has been constructively repealed as appears in the schedule. Section 2 repeals inconsistent statutes, and § 3 is when to take effect.

L. 1900, Ch. 367. Sections 1–4, 6–10, 12 have been constructively repealed as appears in the schedule. Sections 5, 11 consolidated in Liquor Tax Law in § 15, subd. 11, and § 35, subd. 2, respectively. Section 13 is when to take effect.

L. 1901, Ch. 640. Sections 1–7 have been constructively repealed as appears in the schedule. Section 8 repeals, and § 9 is when to take effect.

L. 1903, Ch. 115. Section 1 is consolidated in Liquor Tax Law, § 8. Sections 2, 3 have been constructively repealed, as appears in the schedule. Section 4 repeals, and § 5 is when to take effect.

L. 1903, Ch. 486. Sections 1–5, 7, 12, 13, so far as amendatory of Liquor Tax Law, § 31, subd. C, and 16, have been constructively repealed, as appears in the schedule. Section 6 is consolidated in Liquor Tax Law, § 10. Section 8 in § 12, subd. 17. Section 9 in § 16. Section 10 in § 19. Section 11 in § 24. Section 13, remainder, in §§ 30 and 2. Section 14 in § 31. Section 15 in § 35, subds. 1, 4. Section 17 in § 39. Section 18 is when to take effect.

L. 1904, Ch. 205. Consolidated in Liquor Tax Law, § 30, subd. C.

L. 1904, Ch. 348. Consolidated in Liquor Tax Law, § 7.

L. 1905, Ch. 104. Consolidated in Liquor Tax Law, § 23, subd. 1.

L. 1905, Ch. 677. Sections 1, 2 have been constructively repealed, as appears in the schedule. Section 3 is consolidated in Liquor Tax Law, § 23, subd. 2.

L. 1905, Ch. 679. Consolidated in Liquor Tax Law, § 2.

L. 1905, Ch. 680. Sections 1, 3 have been constructively repealed, as appears in the schedule. Section 2 is consolidated in Liquor Tax Law, § 21. Section 4 in § 35, subd. 7. Section 5 in § 38. Section 6 is when to take effect.

L. 1905, Ch. 697. Duration limited to year 1905.

L. 1906, Ch. 183. Consolidated in Liquor Tax Law, § 32.

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L. 1906, Ch. 272. Consolidated in Liquor Tax Law, § 27, subd. 2.

L. 1907, Ch. 345. Consolidated in Liquor Tax Law, as follows: Section 1 in § 3. Section 2 in § 5. Section 3 in § 6. Section 4 in § 11. Section 5 in § 13. Section 6 in § 15. Section 7 in § 6.

L. 1907, Ch. 460. Consolidated in Liquor Tax Law, § 29, subd. 5.

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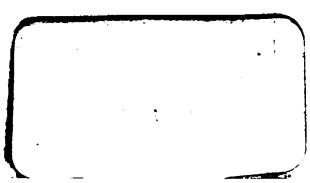

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